154 U.S. 13
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RECORD, CASE No. 14,365.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 318.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE H. McFADDEN, JOHN H. McFADDEN, AND FRANKLIN McFADDEN, COMPOSING THE FIRM OF GEORGE H. McFADDEN & BROTHER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 21, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 5, 1893.

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1 *Caption.*

Be it remembered that at a term of the circuit court of the United States within and for the fifth judicial circuit and the northern district of Texas, at Dallas, which term convened on the 19th day of May, 1890, and adjourned on the 9th day of June, 1890—present and presiding, the Honorable A. P. McCormick, United States district judge—the following cause, among others, came on for trial, to wit:

GEORGE H. McFADDEN & BROTHER
vs.
THE MISSOURI PACIFIC RAILWAY CO. } No. 1219.

2 THE STATE OF TEXAS,
County of Hunt.

Caption.

At a term of the district court begun and holden at Greenville, within and for the county of Hunt, before the Hon. J. A. B. Putman, and ending on the 24th day of August, A. D. 1888, the following case came on to be heard, to wit:

In District Court, July Term, 1888.

GEO. H. McFADDEN & BRO.
vs.
MO. PAC. R'Y CO. } # 2393.

Original Petition. Filed May 12th, 1888.

THE STATE OF TEXAS,
County of Hunt.

To the Hon. J. A. B. Putman, judge of said court:

The petition of George H. McFadden and John H. McFadden and Franklin McFadden, complaining of the Missouri Pacific Railway Company, *and* shows to the court that plaintiffs are partners in trade, doing business under the firm name and style of Geo. H. McFadden & Bro., in the city of Philadelphia, State of Pennsylvania, where plaintiffs Geo. H. & J. Franklin reside; that plaintiffs John H. resides in the city of Liverpool, England, and that the defendant is a corporation, incorporated under and by virtue of the laws of the State of Missouri; that its principal office is in the city of St. Louis, in said State; that Jay Gould is the president of said company, but the other officers are unknown to plaintiffs; that said corporation is engaged in operating a line of railway through Hunt county, and has a local agent in the town of Greenville, to wit, A. L. Downer; that at the dates hereinafter mentioned the defendant was and still is engaged

in the business of running railroad cars and of trans-
3 porting passengers and freight as a common carriers for hire.

That on the 12th and 14th days of Nov., 1887, A. Fulton & Co., who were engaged in the business of buying and selling cotton, delivered to the defendant at said town of Greenville and defendant then and there accepted and received from said Fulton & Co. as such common carriers the following-described property, to wit: two hundred bales of cotton of the aggregate weight of 103,124 lbs. and of the value of ten thousand three hundred and twelve & $\frac{40}{100}$ dollars, to be safely and securely taken and conveyed by defendant for said Fulton & Co. from said town of Greenville to the city of Liverpool, in England, to be safely and securely delivered unto order of said Fulton & Co. or assigns for a certain reward to be paid for the same on the delivery thereof as aforesaid, to wit: $1.36 per 100 lbs.; that on the delivery of the said cotton to the defendant as aforesaid said defendant executed and delivered to said Fulton & Co. its two certain receipts or bills of lading in substance as follows, to wit:

First Bill Lading.

The Missouri Pacific Railway Co., from Greenville, Texas, to Liverpool, England, shipped in apparent good order, by A. Fulton & Co., the packages, property, or articles marked, numbered, and specified as below:

Gross weight, 51,388 lbs.

Rate of freight, 136 cts. per 100 lbs.

Marks and numbers: 50 b. c., P. U. G.; 50 b. c., G. O. F.

Tags, 11418–11517, inc.

One hundred bales cotton. Notify Fredric Zerega & Co., Liverpool, England.

4 To be delivered unto order of A. Fulton & Co. or to their assignees, he — they paying freight in cash on the landing of said cotton at the rate of one hundred and thirty-six cents per 100 lbs. gross weight. Dated in Greenville, Texas, Nov. 12th, 1887.

(Signed) A. L. DOWNER,
Agent Mo. Pac. R'y Co.

The Second Bill Lading.

The Missouri Pacific Railway Co., from Greenville, Texas, to Liverpool, England, shipped in apparent good order, by A. Fulton & Co., the packages, property, or articles marked, numbered, and specified as below:

Gross weight, 51,736 lbs.

Rate of freight, 136 cts. per 100 lbs.

Marks & numbers: 15 b. c., D. R. E.; 65 b. c., O. T. P.; 20 b. c., G. U. P.

Tags, 12408–12507, inc.

Articles: One hundred bales cotton. Notify Fredric Zerega & Co.,

Liverpool, England. To be delivered in like good order and condition unto order of A. Fulton & Co. or to their assignees, he or they paying freight in cash on the landing of said cotton at the rate of one hundred and thirty-six cents per 100 lbs.

Greenville, Texas, Nov. 14th, 1887.

(Signed) A. L. DOWNER,
Agent Mo. Pac. R'y Co.

That the 200 bales cotton mentioned in said receipt or bill of lading were marked, directed, and tag-ed as afore stated and contained the number of lbs. in said receipts specified.

That after the execution and delivery of the said receipts or bills of lading by the defendant to the said Fulton & Co., and on the same day of their respective dates and in the due course of trade, the said A. Fulton & Co. endorsed and delivered both of said receipts or bills of lading to plaintiffs, thereby they became the assignees of the said A. Fulton & Co., and the said defendant promised and became liable to deliver to plaintiffs said cotton, according to the terms, tenor, effect, and reading of said receipts or bills of lading; that the said defendant did not safely or securely carry and convey from the said town of Greenville to the said city of Liverpool, nor did it safely or securely deliver to plaintiffs, nor to any person for them or either of them, the said cotton or any part thereof, whereby the said cotton of plaintiffs above mentioned became wholly lost to them, and all benefit and advantage which they might and would have derived from the safe and secure delivery of said cotton as aforesaid. Wherefore plaintiffs sue and pray for judgment against the defendant for the sum of ten thousand three hundred and twelve & $\frac{40}{100}$ dollars, with interest thereon at the rate of 8 per cent. per annum from the 14th day of Nov., 1887, for costs of suit, and such other relief as they may be entitled to in the premises.

PERKINS, GILBERT & PERKINS,
Att'ys for Plaintiffs.

2393. Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Original petition. Filed May 12th, 1888. J. G. Shipherd, clerk dist. court, Hunt Co., Texas.

Citation. Filed May 24th, 1888.

The State of Texas to the sheriff or any constable of Hunt county, Greeting:

You are hereby commanded to summon the Missouri Pacific Railway Company to be and appear before the honorable district court of Hunt county, Texas, at the next regular term thereof, to be holden at the court-house, in the town of Greenville, on the first Monday in July, A. D. 1888, then and there to answer the plaintiffs' petition, filed in a suit in said court on the 12th day of May, A. D. 1888, wherein George H. McFadden, John H. McFadden, and J. Franklin McFadden, doing business under the firm name of Geo.

H. McFadden & Bro., in the city of Philadelphia and State of Pennsylvania, are plaintiffs, and The Missouri Pacific Railway Company are defendants, file number of said suit being # 2393.

The nature of the plaintiffs' demand is as follows, to wit:

For ten thousand three hundred and twelve and $\frac{40}{100}$ dollars, with interest thereon at the rate of 8 per cent. per annum from the 14th day of Nov., 1887. On the 12th and 14th days of Nov., 1887, A. Fulton & Co., who were engaged in the business of buying and selling cotton, delivered to the defendant, at the town of Greenville, and defendant then and there accepted and received from said Fulton & Co. two hundred bales of cotton, the aggregate weight of 103,124 lbs., of the value of ten thousand three hundred and twelve and $\frac{40}{100}$ dollars, to be safely and securely taken and conveyed by defendants to the city of Liverpool, in England, to be safely and securely delivered unto order of Fulton & Co. or assigns for a certain reward, to be paid for the same on the delivery thereof as aforesaid, to wit, $1.36 per 100 lbs. Plaintiffs aver that defendant did not safely
7 or securely carry and convey from the said town of Greenville to the said city of Liverpool, nor did it safely or securely deliver to plaintiffs, nor to any person for them or either of them, the said cotton or any part thereof, whereby the said cotton of plaintiffs above mentioned became wholly lost to them, and all benefit and advantage which they might and would have derived from the safe and secure delivery of said cotton as aforesaid. Wherefore plaintiffs sue and pray for judgment against the defendant for the sum of ten thousand three hundred and twelve and $\frac{40}{100}$ dollars, with interest thereon at the rate of 8 per cent. per annum from the 14th day of Nov., 1887, for cost of suit, and such other relief as they may be entitled to in the premises.

N. B.—After the execution and delivery of the said receipts or bills of lading by the defendant to the said Fulton & Co., and on the same day of their respective dates and in due course of trade, the said Fulton & Co. endorsed and delivered both of said receipts or bills of lading to plaintiffs; thereby they became the assignees of the said A. Fulton & Co., and the said defendant promised and became liable to deliver to plaintiffs said cotton according to the terms, tenor, effect, and reading of said receipts or bills of lading.

And you will deliver to said defendant, Missouri Pacific Railway Company, in person, a true copy of this citation.

Herein fail not, and have you before said court this writ, with your endorsement thereon showing how you have executed the same.

Given under my hand and seal of said court, at office in
[SEAL.] Greenville, this the 21st day of May, A. D. 1888.

Attest: J. G. SHIPHERD,
Clerk Dist. Court, Hunt Co., Texas.

8 *Sheriff's Return.*

Came to hand the 23rd day of May, A. D. 1888, and was executed the 23rd day of May, A. D. 1888, by delivering to A. L. Downer, agent for the Mo. Pacific Railway Company at Greenville, a station

in Hunt county, the within-named defendant, in person, a true copy of this writ.

Fees: Serving 1 copy, $1.50.

S. J. MASON,
Sheriff of Hunt County, Texas,
By O. B. CHAFFIN, *Deputy.*

Endorsement to citation:

#2393. District court, Hunt county, Texas, July term, 1888. Geo. H. McFadden & Bro. *vs.* Missouri Pacific Railway Company. Issued May 21st, 1888. J. G. Shipherd, clerk dist. court, Hunt county, Texas.

Original Answer. Filed July 2nd, 1888.

In District Court of Hunt County.

GEO. H. MCFADDEN & BRO.
vs.
MO. PAC. RY. CO. } # 2393.

Now comes the defendant and excepts to plaintiffs' — and says the same is insufficient, and of this it prays judgment of the court.

BRYANT & DILLARD,
Att'ys for Def't.

For answer defendant denies all and singular plaintiffs' allegations and demands strict proof thereof.

9 BRYANT & DILLARD,
Att'ys for Def't.

Endorsement to original answer:

#2393. Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Original answer. Filed July 2nd, 1888. J. G. Shipherd, clerk dist. court, Hunt. Co., Texas.

Petition for Removal to U. S. Circuit Court. Filed July 5th, 1888.

Petition for removal to the circuit court of the United States for the northern district of Texas.

STATE OF TEXAS, }
Hunt County. }

In District Court, Hunt County.

To the honorable said district court of Hunt county:

Your petitioner, The Missouri Pacific Railway Company, respectfully represents that it is defendant and sole defendant in cause #2393 of Geo. H. McFadden & Bro. *vs.* Missouri Pacific Railway Company, which is now pending in the said district court of Hunt county, Texas, and was herein filed on the 12th day of February, 1888. Petitioner further says that the 6th day of July, 1888, is the day when, under the law of the State of Texas, it is required to an-

swer plaintiffs' suit, and that it has all of said day in which to answer, but petitioner further says that its answer is herein filed, and that the controversy in said suit is between it, said defendant, and plaintiffs, and that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

10 Petitioner further says that it is a corporation duly and legally incorporated under the laws of the State of Missouri and is a citizen of said last-named State and was such at the time of the institution of this suit; that the said plaintiffs in this suit are Geo. H. McFadden, John H. McFadden, and J. Franklin McFadden; that all of said plaintiffs at the time of the institution of this suit were and still are citizens of the State of Pennsylvania, the said Geo. H. McFadden and J. Franklin McFadden then and now residing in the said State of Pennsylvania and the said John H. McFadden then and now residing in the Kingdom of Great Britain. Petitioner says that said controversy is between citizens of different States, as above more fully appears, and that petitioner is and at the time of the institution of this suit was a non-resident of the State of Texas and not a citizen of the State of Texas.

Petitioner further says that plaintiffs sue upon a certain contract or instrument in writing made and entered into between it and A. Fulton & Co.; which said contract is partially pleaded in plaintiffs' original petition and from said petition said contract will more fully appear.

Plaintiffs allege the assignment of said instrument to them by said A. Fulton & Co. and sue as such assignee. Petitioners say that said A. Fulton & Co. consisted of A. Fulton alone, who did the business under the style of A. Fulton & Co., and with said A. Fulton was said contract made. Petitioner says that at the time said contract between petitioner and said A. Fulton was made and at the time this suit was instituted said A. Fulton was and that he now is a resident citizen of the State of Texas and of the northern district thereof, and during all said time petitioner has been a resident citizen of said State of Missouri, and during no part of said

11 time a resident citizen of the State of Texas; wherefore petitioner says if suit had been instituted on said contract by said A. Fulton it would have had the right to remove the same to the United States circuit court.

Your petitioner offers herewith a bond, with good and sufficient surety, for the entering in said circuit court of the United States for the northern district of Texas, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed unto said circuit court of the United States in and for the northern district of Texas; and, as in duty bound, he will ever pray.

BRYANT & DILLARD,
Att'ys for Petitioner.

THE STATE OF TEXAS, }
Hunt County. }

I, F. C. Dillard, being duly sworn, do say that I am a member of the firm of Bryant & Dillard, the attorneys for petitioner in the above-shown cause: that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

F. C. DILLARD.

Subscribed by the said F. C. Dillard in my presence and by him sworn to before me this the 5th day of July, 1888.

12 J. G. SHIPHERD,
Clerk Dist. Court, Hunt County, Texas.

Endorsement to petition for removal to U. S. circuit filed July 5th, 1888:

#2393. Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Petition for removal to U. S. circuit court. Filed July 5th, 1888. J. G. Shipherd, clerk dist. court, Hunt county, Texas.

Motion for Removal. Filed July 5th, 1888.

GEO. H. McFADDEN & BRO. }
vs. } #2393.
MO. PAC. R'Y CO. }

Now comes the defendant and shows unto the court its petition and bond for removal herein, and prays the court that the removal be granted, for the reasons in its petition shown.

BRYANT & DILLARD,
Att'ys for Def't.

Endorsement to motion for removal:

#2393. Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Motion for removal. Filed July 5th, 1888. J. G. Shipherd, clerk dist. court, Hunt county, Texas.

Order of Court Sustaining Motion for Removal.

13 GEO. H. McFADDEN & BRO. }
vs. } # 2393.
MO. PAC. R'Y CO. }

AUG. 13TH, 1888.

On this day, this cause being called, came the parties by attorney. Then came on to be heard the motion of defendant, filed herein, to remove this cause to the United States circuit court for the northern district of Texas, at Dallas, and presents to the court its petition and bond for such removal, and the same being examined and fully heard by the court, because it is the opinion of the court the law is for the defendant, it is therefore considered that the said motion be sustained, and that said bond for removal be approved, and that

this cause be removed to said U. S. circuit court for the northern district of Texas, sitting at Dallas, in the manner prescribed by law.

Bond for Removal. Filed July 5th, 1888.

STATE OF TEXAS, }
Hunt County. }

GEO. H. McFADDEN & BRO. }
vs. } # 2393.
MO. PAC. R'Y CO. }

Know all men by these presents that the Missouri Pacific Railway Company, as principal, and J. M. Ragsdale, J. C. R. Haynes, and C. W. Collier, as sureties, are held and firmly bound unto Geo. H. McFadden, John H. McFadden, and J. Franklin McFadden in the penal sum of one thousand dollars; for the payment whereof, well and truly to be made unto the said Geo. H. McFadden, John H. McFadden, and J. Franklin McFadden, their heirs and assigns, we hereby bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said Missouri Pacific Rail-
14 way Company having petitioned the district court of Hunt county, State of Texas, for removal of a certain cause therein pending, wherein the said Geo. H. McFadden, John H. McFadden, and J. Franklin McFadden are plaintiffs and The Missouri Pacific Railway Company is defendant, to the circuit court of the United States for the northern district of Texas, now, if the said Missouri Pacific Railway Company, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this the 5th day of July, A. D. 1888.

MISSOURI PACIFIC RAILWAY COMPANY, [L. S.]
By BRYANT & DILLARD, *Its Attorneys.*
J. M. RAGSDALE. [L. S.]
J. C. R. HAYNES. [L. S.]
C. W. COLLIER. [L. S.]

Approved this bond the 13th day of August, A. D. 1888.
J. G. SHIPHERD,
Clerk Dist. Court, Hunt Co., Texas.

Endorsement to bond for removal:

2393. Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Bond for removal. Filed July 5th, 1888. J. G. Shipherd, clerk dist. court, Hunt county, Texas.

15 *Clerk's Bill of Cost.*

Doc., .20; app., .60; file. 6 papers, .90; 1 cit., .75; 1 cop. petition, $2.35; 1 motion, .20	$5 00
1 order, .75; approving appeal bond, $1.50; tax cost, .25	2 50
Transcript to U. S. circuit court, northern dist. Tex	10 00
Total amount of clerk's cost	$17 50

Sheriff's Fees.

To serve 1 citation, $1.50; jury tax, .50	$2 00
Clerk's fees brought forward	17 50
Total	$19 50

Clerk's Certificate.

THE STATE OF TEXAS, }
County of Hunt. }

I, J. G. Shipherd, clerk of the district court in and for Hunt county, Texas, do hereby certify that the within 16 pages contains a true and correct copy of the records and papers in case of Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co., and numbered 2393, as appears on file in dist. court, Hunt county, Texas.

Given under my hand and the seal of said court, at office, [SEAL.] in the city of Greenville, this 7th day of September, A. D. 1888.

J. G. SHIPHERD,
Clerk Dist. Court, Hunt County, Texas.

The foregoing is endorsed as follows, to wit:

2393. Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Removed to U. S. circuit court of the northern district of Texas from
16 Hunt county, Texas. Filed 21st Sept., 1888. F. W. Girand, clerk. Filed Jan'y 15th, 1889. A. J. Houston, clerk, by W. L. McDonald, deputy.

17 STATE OF TEXAS, }
Hunt County. }

In the case of G. H. McFadden & Bro. against The Missouri Pacific Railway Company, transferred from the district court of Hunt county to the United States circuit court for the northern district of Texas, sitting at Graham, it is agreed that said case shall be transferred to Dallas.

This September 6th, 1888.

PERKINS, GILBERT & PERKINS,
Att'ys for Pl't'ffs.
BRYANT & DILLARD, *Att'ys for Def't.*

The foregoing is endorsed as follows, to wit:

1219. Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Agree-

ment for transfer of case. Filed 21st Sept., 1888. F. W. Girand, clerk. Filed January 15th, 1889. A. J. Houston, clerk, by W. L. McDonald, deputy.

18 In the United States Circuit Court.

From the minutes of said court, Oct. term, 15th day, 1888.

GEO. H. McFADDEN & BRO. *vs.* MO. PAC. R'Y CO. } # 160.

Ordered that this cause be, and the same is hereby, transferred to Dallas branch of this court; further ordered that the clerk transmit all papers in case to the clerk of the circuit court at Dallas, with a certified copy of this order.

I, F. W. Girand, clerk of the circuit court of the United States for the northern district of Texas, at Graham, do hereby certify that the foregoing is a true and correct copy of an order made and entered as appears in the record of said court.

Witness whereof I hereunto set my hand and affix the [SEAL.] seal of said court, at Graham, this 8th day of Jan., 1889.

F. W. GIRAND, *Clerk.*

The foregoing is endorsed as follows, to wit:

1219. Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Copy order of court. Filed January 15th, 1889. A. J. Houston, clerk, by W. L. McDonald, deputy.

19 GEO. H. McFADDEN *vs.* THE MO. PAC. R'Y CO. } # 1219.

JUNE 3D, 1890.

Ordered by the court that both parties have leave to amend.

20 "EXHIBIT A."

Form 3038.

Foreign bill lading No. F 46. Contract No. 250.

The Missouri Pacific Railway Company.

From Greenville, Texas, to Liverpool, England.

Shipped, in apparent good order, by A. Fulton & Co. the packages, property, or articles marked, numbered, and specified as below. Contents, *guage*, value, and condition of contents unknown. Weights subject to correction.

Gross weight, 51,388 lbs.

Rate of freight: 136 cents per 100 lbs.

Marks and numbers: 50 b. c., P. U. G.; 50 b. c., G. O. Z.; 100.

Tags: 11418–11517, inc.

One hundred bales cotton. Notify Frederic Zarega & Co., Liverpool, England.

The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or steamship company at the time of shipment. To be delivered in like good order and condition unto order A. Fulton & Co. or to their assigns, he or they paying the freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of one hundred and thirty-six cts. per 100 lbs. gross invoice weight, with average accustomed (at $4.80 to the pound sterling) under the following terms and conditions, viz:

(1.) All goods or property under this bill of lading will be subject, at *its* owner's cost, to all necessary cooperage or baling.

(2.) That the said Missouri Pacific Railway Company and
21 its connections which receives said property shall not be liable for rust of iron and of iron articles or for loss or damage by wet, dirt, fire, or loss of weight or for condition of baling on hay, hemp, or cotton, nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars, nor for damage to perishable property of any kind occasioned by delays from any cause or by changes of weather, nor for loss or damage on any article or property whatever by fire or other casualty while in transit or while in deposit of places of transhipment or at depots or landings at all points of delivery, nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. All goods or property under this bill of lading *is* to be transported to the depots of the companies or landings of the steamboats or forwarding lines at the points receipted to for delivery.

(3.) It is further agreed that said Missouri Pacific Railway Company and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees or their agents at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts of lots as they may be delivered to them.

(4.) It is further stipulated and agreed that in case of any loss, detriment, or damage to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may occur, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage.

22 (5.) And it is further agreed that the amount of loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this bill of lading.

(6.) The Missouri Pacific Railway Company and its connections

will not be accountable for gold, silver, bullion, specie, jewelry, precious stones or metals unless so specified in the bill of lading and the value thereof declared therein.

(7.) It is further agreed that the said Missouri Pacific Railway Company have liberty to forward the goods or property to port of destination by any other steamer or steamship company than that named hereon; and this contract is executed and accomplished and the liability of the Missouri Pacific Railway Company as common carriers thereunder terminates on the delivery of the goods or property to the steamship or steamship company or to their agents at Galveston, when the responsibility of the steamship or steamship company commences, and not before.

(8.) And it is further agreed that the property shall be transported from the port of Galveston, Texas, to the port of Liverpool, Eng., by the steamship Mallory and Cunard lines, with liberty to ship by any other steamship or steamship company, subject to the following terms and conditions, viz:

To be delivered from the ship's deck, where the ship's responsibility shall cease, the acts of God, the Queen's enemies, pirates, robbers, thieves, vermin, jettison, barratry of masters or mariners, misfeas*nace*, error in judgment, negligence or default of pilot, master, mariners, engineers, or other person in the service of the
23 ship (whether in navigating the ship or otherwise), restraints of princes, rulers of people, inaccuracies, obliterations or absence of marks, numbers, or address, loss or damage resulting from insufficiency of strength of packages, sweating, leaking, breakage, rain, spray, rust, decay, stowage, or contact with other goods, risk of lighterage, explosion or fire at sea, in craft, or on shore, before lading or after unlading, accidents from machinery, boilers, steam, or any other accidents of the seas, land, river, and steam navigation of whatever nature or kind soever excepted, however caused or originating (whether any one or more of all such exception-arise, occur, or in any way occasioned from or by the negligence, default, or error in judgment of masters, mariners, engineers, or others of the crew or any of the servants or employees of the ship-owners or otherwise however), and with liberty during the voyage to call at any port or ports to receive fuel, to load or discharge cargo, or for any other purpose whatever, to sail with or without pilots, to tow and assist vessels in all conditions, and in the event of said steamer being full of cargo or putting back to any port or being otherwise prevented from proceeding in the ordinary course of her voyage to tranship the goods by any other steamer.

All fines, expenses, or losses by detention of or damage to vessel or cargo caused by incorrect or insufficient marking of the packages or describing the contents thereof shall be paid by the shipper or consignee of the goods, and the ship-owner has a lien upon the goods until the payment of all such costs, charges, or damages.

The master is at liberty to lighter the goods, if necessary, at ship's expense, but shipper's risk. Freight payable in cash, free of
24 interest and discount, on the gross landing weight (freight on all liquids to be paid on in-take quantity). Goods, if any,

which by special agreement herein are to be forwarded from port of discharge to any other port or place shall be so forwarded at ship's expense, but at the risk of the owners of the goods, and shall be subject to all conditions which may be exacted by the companies or individuals who may complete the transit.

Weights, measures, contents, quality, brand, and value unknown, and not answerable for leakage or breakage or incorrect delivery of goods arising from insufficiency of marks and numbers; not accountable for condition of bagging or country damage, if any. The goods to be taken from alongside by the consignee where the steamer discharges immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk of fire, loss, or injury in the warehouse provided for that purpose at port of discharge or sent to the public store, as the collector of the port shall direct, and, when deposited in the warehouse, to be subject to storage, the collector of port being hereby authorized to grant a general order for discharge immediately after entry of the ship; porterage of the delivery of the cargo to be done by the consignees of the steamer at the expense and risk of the receiver of the cargo.

In accepting this bill of lading the shipper or agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions, none of which shall be deemed to be rendered void by any customs of ports.

This bill of lading, duly endorsed by consignees, to be given up on demand to agents of steamer in exchange for ship's copy and order for delivery.

25 The liability of the Missouri Pacific Railway Company is hereby limited to its own lines of railway and is to cease upon delivery to the next succeeding carrier of the articles specified herein.

In witness whereof the agent signing for the said railway and steamship companies hath affirmed to three (3) bills of lading of this tenor and date, one of which being accomplished the others to stand void.

Dated in Greenville, Texas, Nov. 12, 1887.

(Signed) A. L. DOWNER, *Agent*,
Agents Severally but not Jointly.

(Signed O K) W. H. MURPHY, *Sup't.*

EXHIBIT A.

Bonded goods. Consignee to furnish landing certificate free of expense to the carrier.

Attention of shippers is called to the act of Congress of 1851.

Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder in a ship or vessel taking cargo for divers persons on freight without delivering at the time of the shipment a note in writing expressing the nature and character of such merchandise to the master, mate, or person or persons in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars.

26 "EXHIBIT B."

Form 3038.

Foreign bill lading No. F 55. Contract No. 250.

The Missouri Pacific Railway Company.

From Greenville, Texas, to Liverpool, England.

Shipped, in appa-ent good order, by A. Fulton & Co. the packages, property, or articles marked, numbered, and specified as below. Contents, gauge, value, and condition of contents unknown. Weights subject to correction.

Gross weight, 51,726 lbs.

Rate of freight: 135 cents per 100 lbs.

Marks and numbers: 15 b. c., D. R. E.; 65 b. c., O. T. P.; 20 b. c., G. U. P; 100.

Tags: 12408–12507.

One hundred bales cotton. Notify Frederic Zerega & Co., Liverpool, England.

The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or steamship company at the time.

To be delivered in like good order and condition unto order A. Fulton & Co. or to their assigns, he or they paying freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of one hundred and thirty-six cents per 100 lbs. gross invoice weight, with average accustomed (at $4.80 to the pound sterling) under the following terms and conditions, viz:

(1.) All goods or property under this bill of lading will be subject, at *its* owner's cost, to all necessary cooperage or baling.

(2.) That the said Missouri Pacific Railway Company and
27 its connections which receives said property shall not be liable for rust of iron and of iron articles or for loss or damage by wet, fire, or loss of weight or for condition of baling on hay, hemp, or cotton, nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars, nor for damage to perishable property of any kind occasioned by delays from any cause or by changes of weather, nor for loss or damage on any article or property whatever by fire or other casualty while in transit or while in deposit of places of transhipment or at depots or landings at all points of delivery, nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. All goods or property under this bill of lading *is* to be transported to the depots of the companies or landings of the steamboats or forwarding lines at the points receipted to for delivery.

(3.) It is further agreed that said Missouri Pacific Railway Company and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees or their agents at or by

the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts of lots as they may be delivered to them.

(4.) It is further agreed and stipulated that in case of any loss, detriment, or damage to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held responsible therefor in whose custody the same may be at the time of the happening of such loss, detriment, or damage.

28 (5.) And it is further agreed that the amount of loss or damage so accruing, so far as it shall fall on the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this bill of lading.

(6.) The Missouri Pacific Railway Company and its connections will not be accountable for gold, silver, bullion, specie, jewelry, precious stones or metals unless so specified in the bills of lading and the value thereof declared therein.

(7.) It is further agreed that the said Missouri Pacific Railway Company have liberty to forward the goods or property to port of destination by any other steamer or steamship company than that named hereon; and this contract is executed and accomplished and the liability of the Missouri Pacific Railway Company as common carriers thereunder terminates on the delivery of the goods or property to the steamship or steamship company or their agents at Galveston, when the responsibility of the steamship or steamship company commences, and not before.

(8.) And it is further agreed that the property shall be transported from the port of Galveston to the port of Liverpool, England, by the steamship Mallory and Cunard —, with liberty to ship by any other steamship or steamship company, subject to the following terms and conditions, viz:

To be delivered from the ship's deck, where the ship's responsibility shall cease, acts of God, the Queen's enemies, pirates, robbers, thieves, vermin, jettison, barratry of masters or mariners, misfea-ance, error in judgment, negligence or default of pilot, master, mariner-, engineers, or other person in the service of the ship (whether in navigating the ship or otherwise), restraints of

29 princes, rulers of people, inaccuracies, obliteration or absence of marks, numbers, or address, loss or damage resulting from insufficiency of strength of packages, sweating, leaking, breakage, rain, spray, rust, decay, stowage, or contact with other goods, risk of lighterage, explosion or fire at sea, in craft, or on shore, before lading or after unlading, accidents from machinery, boilers, steam, or any other accidents of the seas, land, river, and steam navigation of whatever nature or kind soever excepted, however caused or originating (whether any one or more of all such exceptions arise, occur, or in any way occasioned from or by the negligence, default, or error in judgment of the masters, mariners, engineers, or others of the crew

or any of the servants or employees of the ship-owners or otherwise however), and with liberty during the voyage to call at any port or ports to receive fuel, to load or discharge cargo, or for any other purpose whatever, to sail with or without pilots, to tow and assist vessels in all situations, and in the event of said steamer being full of cargo or putting back to any port or being otherwise prevented from proceeding in the ordinary course of her voyage to tranship the goods by any other steamer.

All fines, expenses, or losses by detention of or damage to vessel or cargo caused by incorrect or insufficient marking of the packages or describing the contents thereof shall be paid by the shipper or consignee of the goods, and the ship-owner has a lien upon the goods until the payment of all such costs, charges, or damages.

The master is at liberty to lighter the goods, if necessary, at the ship's expense, but shipper's risk. Freight payable in cash, free of interest and discount, on the gross landing weight (freight on all liquids to be paid on in-take quantity). Goods, if any, which by special — herein are to be forwarded from port of discharge to any
30 other port or place shall be so forwarded at ship's expense, but at the risk of the owner of the goods, and shall be subject to all conditions which may be exacted by the companies or individuals who may complete the transit.

Weights, measures, contents, quality, brand, and value unknown, and not answerable for leakage or breakage or incorrect delivery of goods arising from insufficiency of marks and numbers; not accountable for condition of bagging or country damage, if any. The goods to be taken from alongside by the consignee where the steamer discharges immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk of fire, loss, or injury in the warehouse provided for that purpose at the port of discharge or sent to the public store, as the collector of the port shall direct, and, when deposited in the warehouse, to be subject to storage, the collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship; porterage of the delivery of the cargo to be done by the consignees of the steamer at the expense and risk of the receivers of the cargo.

In accepting this bill of lading the shipper or agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions, none of which shall be deemed to be rendered void by any custom of ports.

This bill of lading, duly indorsed by consignee, to be given up on demand to agents of steamer in exchange for ship's copy and order for delivery.

The liability of the Missouri Pacific Railway Company is hereby limited to its own lines of railway, and is to cease upon delivery tc the next succeeding carrier of the articles specified herein.
31 In witness whereof the agent signing for the said railway and steamship companies hath affirmed to three (3) bills of

lading of this tenor and date, one of which being accomplished, the others to stand void.

(Signed) A. L. DOWNER,
Agent Mo. Pac. R'y Co.,
Agents Severally but not Jointly.

(Signed O K) W. H. MURPHY, *Sup't.*

Dated in Greenville, Texas, Nov. 14th, 1887.

EXHIBIT B.

Bonded goods. Consignee to furnish landing certificates free of expense to the carrier.

Attention of shippers is called to the act of Congress of 1851.

"Any person or persons shipping oil of vitr-ol, unslacked lime, inflammable matches, or gunpowder in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or person or persons in charge of the loading of the ship or vessel shall forfeit to the United States one thousand dollars."

32 GEO. H. McFADDEN & BRO. *vs.* MISSOURI & PACIFIC R'Y CO. } # —.

Suit pending in the U. S. circuit court for the northern district of Texas, at Dallas.

Now comes the defendant, leave of court being first had, and files this his first amended original answer amending its original answer herein filed on the — day of ——, 1888, and for such amendment says that it excepts to plaintiff's petition, and that the same is insufficient in law, and of this it prays judgment.

F. C. DILLARD,
Attorney for Defendant.

For answer defendant denies all and singular the allegations by plaintiff made and demands strict proof thereof.

F. C. DILLARD,
Attorney for Defendant.

For special answer defendant says:

First. That while it is true that it had issued certain bills of lading for said cotton, said cotton had not yet in deed and in truth been delivered to it. It was the habit and custom of defendant, and well known to plaintiff to be such, after cottons were placed on the platform at the compress in Greenville, before the same was compressed it would issue bills of lading therefor to consignors desiring to ship. Said cottons would be delivered to the compress for the purpose of compressing, and that at the time they were so delivered to it the superintendent of the compress or agent of the compress would check out such cottons intended, and the shipper would

make out a bill of lading, which would be O K'd by the superintendent of the compress or its agent and afterwards it would be brought to the agent of defendant and by him signed up, and defend-
33 ent would actually receive said cotton only after it was compressed and delivered upon its cars. This course was pursued as a matter of convenience by the compress company and the shipper, but it was not intended by either the shipper or defendant that the liability of defendant should attach until the cotton was actually delivered upon its cars. This custom was well known to the plaintiffs, Geo. H. McFadden & Bro., and to A. Fulton & Co., and the bills of lading were made out according to this custom by A. Fulton & Co., herein shown, and accepted by A. Fulton & Co. according to such custom. At the time said bills of lading were made the cotton was in the hands of the compress — and according to the custom aforesaid, and had never been delivered to defendant, the defendant's liability as a common carrier had never attached nor had any liability attached, but said cotton, while it was in the hands of the compress company, was wholly destroyed by fire and never came to the hands of the defendant. Defendant says that said cotton was placed on said platform and at said compress for the purpose of being compressed by said A. Fulton & Co.; that they well knew, intended, and expected that said cotton should be compressed before it was shipped. Said cotton while at the compress was under the control of A. Fulton — or its agent, the compress Co.

Second. Defendant says that it is a corporation, duly and legally incorporated under the laws of the State of Missouri; that it is a railway, and that its line of railway, and especially that part of it over which said cotton was to be shipped, does not now and at the time of said intended shipment did not lie wholly within the State of Texas, but partly within said State and partly without said State; that in the manner as aforesaid in the last preceding paragraph in this answer defendant did deliver to A. Fulton &
34 Co. its two certain bills of lading, which were by them duly assigned to plaintiffs, and plaintiffs are notified to produce said bills of lading on the trial of this cause or secondary evidence of the same will be given. Said bills of lading, with all the terms, conditions, and stipulations therein shown, were made and prepared by said A. Fulton & Co. and were presented to said railway company and by it through its agent duly signed and returned by it to said railway company and by them accepted as aforesaid. Defendant says that the shipment intended to be made under and by virtue of said two bills of lading were foreign shipments from the town of Greenville, in the State of Texas, in the United States of America, to the city of Liverpool, in England, in the Kingdom of Great Britain; that said shipments were to be made along the defendant's line of railway and through the port of Galveston and over the high seas to the destination aforesaid; all of which will more fully appear from copies of said bills of lading, hereto attached and marked "Exhibit A" and "Exhibit B" and made a part of this petition as fully as if set out at length; that in said

bills of lading and each of them it was specially stipulated and agreed that said Missouri Pacific Railway Company should not be liable for loss or damage of any article in said bills of lading named, meaning to include thereby said cottons, for loss or damage by fire or other casualty while in transit or while in deposit or place of transshipment or depots or landings or at the points of delivery.

Defendant says that said cotton was at said compress of Greenville, as aforesaid, near the depot of plaintiff; that if defendant's liability had at all accrued, then said cotton was at the place of delivery to defendant, to wit, the place of deposit at the compress,
35 and was there destroyed by fire as aforesaid. Defendant further says that whether or not said transit had commenced that under and by virtue of the terms of said bills of lading this defendant was excused from loss of said cotton by reason — fire. Defendant says that in said bills of lading it was specially agreed and stipulated, as more fully appears, upon the face of the same, that in accepting the bills of lading the shipper or agent of the owner of the property carried or to be carried expressly accepted and agreed to all its stipulations, exceptions, and conditions, none of which should be deemed to be rendered void by any custom of ports. Said bills of lading and stipulations and conditions aforesaid were made out by said A. Fulton & Co., with all the stipulations and conditions aforesaid and therein shown, and presented by said A. Fulton & Co. to defendant for the signature of its agent, the same were signed by said agent and were duly delivered to said A. Fulton & Co. and by them for a full and valuable consideration accepted, and they agreed to all the terms and conditions thereof and took the same subject to such terms and conditions, and said bills of lading, with such terms and conditions attached thereto, have passes into the hands of plaintiffs and they are subjected and bound by the same, and defendant says that without fault or negligence upon its part said cottons were while at the compress at Greenville as aforesaid destroyed by fire.

Third. Defendant says that if plaintiffs are at all entitled to recover from it that then they could recover only the damages actually suffered by them; that at the time said cottons were destroyed by fire as aforesaid plaintiffs had the same insured for their full value in fire insurance companies, and that from said com-
36 panies they received the full value of said cotton.

Fourth. In said bills of lading it was fully agreed that the amount of loss or damage in case of loss or damage to the same should be computed at the value or cost of said property at the time and place of shipment under said bills; that the place of shipment of said cotton was Greenville, Texas, and that the cost and value of the same at said place was — dollars.

Wherefore plaintiffs could recover nothing more than this if they could recover in any event.

F. C. DILLARD,
Attorney for Defendant.

Fourth. If defendant is mistaken in its foregoing pleas, then defendant says that it is true that it did receive from plaintiff, for shipment, as by plaintiff alleged, the cotton by plaintiff named; that said cotton was delivered to defendant for such shipment at Greenville, Texas, and that defendant delivered to plaintiffs its two certain bills of lading aforesaid for said cotton; that said bills of lading were made out by A. Fulton & Co., with all the terms and stipulations therein shown, and were brought by said A. Fulton & Co. to defendant's agent for signature, and that defendant did execute said bills of lading and did deliver them to said A. Fulton & Co., with the terms and stipulations therein shown, to which said A. Fulton fully agreed; that, among other things, it was specially stipulated and agreed in said bills of lading, as therein more fully appears, that defendant should not be liable for loss or damage by fire while said cotton was in transit or at depots, and it was further stipulated in said bills that in accepting the same the shipper or agent of the owner of the property carried expressly accepted and agreed to all its exceptions and conditions.

37 Defendant says that after said cotton had been delivered as aforesaid and the bills of lading issued therefor, and after the transit had commenced and while said cotton was in transit, the same, without fault or negligence on the part of the defendant, was destroyed by fire.

Defendant further pleads that the shipment was a foreign shipment from a point within the State of Texas, in the United States of America, through the port of Galveston and over the high seas to Liverpool, in England, in the Kingdom of Great Britain, and defendant is a corporation duly incorporated under the laws of the State of Missouri; that its line of railway now does not and at the time of said shipment did not lie wholly within the State of Texas, but partly within it and partly without it, and that said shipment was not to be wholly within the State of Texas, but was to be partly within said State of Texas, through said port aforesaid, and over the high seas aforesaid on said bills of lading above shown.

Defendant prays that plaintiffs take nothing by their suit and that defendant go hence and recover of plaintiffs all costs.

F. C. DILLARD,
Attorney for Defendant.

The foregoing is endorsed as follows, to wit:

1219. Geo. H. McFadden & Brother *vs.* Missouri & Pacific Railway Co. First amended original answer. Filed June 3rd, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

38 In U. S. Circuit Court for the Northern District of Texas, at Dallas.

GEO. H. McFADDEN & BRO.
vs.
MISSOURI PACIFIC RAILWAY CO.

Now come the plaintiffs by leave of the court and file this their first supplemental petition in answer to defendant's special amended

original answer filed herein on June 2nd, 1890, and except to said answer and say that the same is insufficient in law, and of this they pray judgment.

And they specially except to the first count in defendant's special answer in so far as the same attempts to set up a custom of the manner of receiving cotton and issuing bills of lading, because the same does not show that the custom was such as is recognized and binding in law, but attempts to set up a custom which is contrary to law, and because the same does not show that it was such a custom as would relieve the defendant from liability on a contract in writing.

2 They specially except to the second and fourth counts in said special answer in so far as the same attempts to set up a contract to excuse the defendant from any liability by reason of damage by fire or other casualty, because said plea shows that the said contract was entered into in the city of Greenville, in the State of Texas, and was therefore governed and controlled by the laws of the State of Texas which prohibits the execution of such contracts as the one set forth by defendant.

3. Plaintiffs specially except to that part of said answer which attempts to set up an agreement to be bound by the custom of ports, because the same is not shown to be material or relevant to this cause.

39 4. Plaintiffs except to that part of said answer which sets up that the plaintiffs had the cotton in controversy insured for its full value, because the same is immaterial and irrelevant to the controversy herein and constitutes no defense in law to the plaintiffs' cause of action.

And, answering said special plea, plaintiffs deny all the allegations therein contained except those which admit the issuance and assignment of the bills of lading and the destruction of said cotton by fire; and of this they put themselves upon the country.

5. For special answer plaintiffs say that the cotton was delivered by Fulton & Co. to the defendant, and the bill of lading was issued by the defendant and assigned to these plaintiffs without notice on their part of any custom or agreement by which the liability of the defendant had not attached, and they say that in truth and in fact the cotton had been received by the def-ndant as a common carrier and was put in its custody, and it became liable under the contract of shipment and the law for the proper and safe handling and care of the same.

And plaintiffs further say that the defendant was not permitted, under its contract of carriage, to stop said cotton for the purpose of having the same compressed.

6. And, further replying to defendant's said answer, the plaintiffs say that the defendant was accustomed to receive all cotton for shipment at Greenville, upon a platform in said city controlled by the compress association, under an agreement between it and said association, the terms and details of which are not known to plaintiffs; and that all cotton for shipment at said point was required by

defendant and compelled to be delivered upon the same;
40 that the defendant, at and about the time the plaintiffs' cotton was received for shipment and bill of lading therefor delivered, had stored other and large quantities of cotton on said platform and continued to store the same there, which said platform was adjacent to several tracks accustomed to be used by defendant and which were built for the purpose of approaching said platform with cars of cotton to be loaded and unloaded, *and* etc.; that defendant, although warned of the danger thereof on account of fire, caused great quantities of cotton to be accumulated upon said platform, to wit, about three thousand bales, and permitted the same to accumulate instead of carrying it off, as it was obliged to do in performance of its duty as common carrier, and as ordinary care and caution required it to do. The defendant, instead of pushing its cars in and alongside of said platform while said cotton, which was highly inflam-able, was exposed near its said tracks, was accustomed to run engines in and near the same, which said engines were out of repair and which, whether in or out of repair, would necessarily have emitted sparks and coals of fire, which would easily ignite said cotton if they came in contact therewith; that defendant was also accustomed to unload cotton along said tracks and permit its engines to pass the same emitting sparks and coals of fire as aforesaid; that on, to wit, the 14th day of November, 1887, while the cotton of plaintiff was so exposed as aforesaid, the defendant carelessly and negligently ran an engine or engines along said tracks adjacent to said cotton, which by reason of sparks and coals of fire emitted therefrom, ignited the same and caused the same to be communicated to the cotton of plaintiffs, which was there upon
the platform, or in the cars of defendant adjacent thereto,
41 where it ought to have been for the purpose of being transported; and plaintiffs say that the accumulation of said cotton in such large quantities and the running of engines at all near the same, which, no matter what the condition of said engines might be with respect to devices, etc., for the prevention of the escape of sparks and coals therefrom, could not be prevented from emitting the same, was an act of negligence, and which said acts of negligence, combined, caused the said cotton to be burned and utterly destroyed. And all this plaintiffs are ready to verify, and pray*s* judgment as in their original petition.

PERKINS, GILBERT & PERKINS,
LEAKE, SHEPARD & MILLER,
Plaintiffs' Attorneys.

The foregoing is endorsed as follows, to wit:

#1219. Geo. H. McFadden & Bro. *vs.* Missouri Pacific Railway Co. Plaintiffs' first supplemental petition. Filed June 3d, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy. Leake, Shepard & Miller.

42 In U. S. Circuit Court for the Northern District of Texas, at Dallas.

GEORGE H. McFADDEN & BRO.
vs.
MISSOURI PACIFIC RAILWAY CO.

Upon the trial of this cause the following facts were introduced:

Plaintiffs offered in evidence the bills of lading, copies of which were attached to defendant's answer. It was admitted that said bills had been assigned by A. Fulton & Co. to plaintiffs.

It was agreed that the cotton in controversy was the property of Geo. H. McFadden & Bro., and that it was destroyed by fire at Greenville, Texas, on the 14th day of November, 1887, subsequent to the time of the execution of the bills of lading.

It was further agreed that said cotton was of the value of $8,647.83 dollars at Greenville, Texas, at the time it was destroyed.

It is further agreed that defendant never paid plaintiffs for said cotton or any part thereof.

The above was all the evidence introduced on the trial of this cause.

PERKINS, GILBERT & PERKINS,
LEAKE, SHEPARD & MILLER,
Att'ys for Plaintiffs.
F. C. DILLARD, *Att'y for Defendant.*

In U. S. Circuit Court for the Northern District of Texas, at Dallas.

GEO. H. McFADDEN & BRO.
vs.
MO. PAC. R'Y CO.

The court approves the agreement as to evidence introduced made by the attorneys in this cause and above shown and
43 finds the facts therefrom as follows:

1. Defendant executed and delivered to A. Fulton & Co. the bills of lading by plaintiffs declared upon and which are fully shown as "Exhibit A" and "Exhibit B" to defendant's first amended original answer. Said bills of lading were duly assigned by A. Fulton & Co. to plaintiffs.

2. The cotton named in said bills of lading was destroyed by fire on the 14th day of November, 1887, at Greenville, Texas, subsequent to the date of the execution and delivery of said bills of lading to A. Fulton & Co. Said cotton was then the property of Geo. H. McFadden & Bro., and was then and there of the value of $8,647.83. Defendants have never paid plaintiffs for said cotton or any part thereof.

From these facts the court concludes:

1. The bills of lading, being executed and delivered in the State of Texas for a shipment originating within said State, must be construed in accordance with the statute law of said State and be held

to have intended to be governed by such law. In accordance with said law all stipulation in said bill releasing defendant from loss or damage by reason of fire is absolutely void.

After the signing of said bills by defendant its duty and liability as a common carrier commenced, and after such time it would be responsible for any loss or damage save such as it could excuse itself from at common law irrespective of contract.

2. Plaintiff will have judgment against defendant for $8,647.83, with interest from Nov. 14th, 1887, at the rate of 8% per annum.

A. P. McCORMICK, *Judge.*

44 The foregoing is endorsed as follows, to wit:

#1219. Geo. H. McFadden & Bro. *vs.* Missouri Pacific Railway Co. Statement of facts and court's findings. Filed June 4th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

45 GEO. H. McFADDEN & BROS. *vs.* MISSOURI PACIFIC R'Y CO. } #1219.

JUNE 4TH, 189–.

This day came the parties, and then came on to be heard the plaintiffs' demurrer and exceptions to the defendant's first amended original answer, filed June 3d, 1890, and, the same having been heard by the court, it is considered that the demurrer and exceptions are well taken.

It is therefore ordered and adjudged that each and every demurrer and exception contained in the plaintiffs' first supplemental petition to the defendant's first amended original answer be, and the same are hereby, sustained; to which action of the court defendant then and there excepted.

And then the parties announced ready for trial on the issues of fact, and, having signed a stipulation waiving a jury in said cause, agreed to submit the matters of fact as well as of law to trial by the court, and, the evidence having been heard, it is considered that the facts are with the plaintiffs.

It is therefore ordered and adjudged by the court that the plaintiffs, Geo. H. McFadden and Bro., a copartnership composed of Geo. H. McFadden, John H. McFadden, and Franklin McFadden, do have and recover of the defendant, The Missouri Pacific Railway Company, the sum of ten thousand four hundred and fifteen and $\frac{80}{100}$ ($10,415.80) dollars, with interest thereon from this date at the rate of 8 % per annum, together with all costs in this behalf incurred and expended, for which let execution issue.

46 And defendant excepts to this judgment of the court and to the rendering of judgment for plaintiffs for that upon the facts found the judgment should be for defendant.

47 In the Circuit Court of the United States for the Northern District of Texas, May Term, 1890.

GEORGE H. McFADDEN & BRO.
vs.
MISSOURI PACIFIC RAILWAY CO.

Be it remembered that at the May term of the United States circuit court for the northern district of Texas, held at Dallas, in the court-room thereof, there was present and presiding on the 4th day of June, 1890, the Hon. A. P. McCormick, district judge, and the following proceedings were had in the case of Geo. H. McFadden & Bro. *vs.* The Missouri Pacific Railway Company:

Plaintiffs presented exceptions to the first, second, and fourth counts of defendant's first amended original answer, filed in said case on the 3rd day of June, 1890, and said counts were as follows:

"First. That while it is true that it had issued certain bills of lading for said cotton, said cotton had not yet in deed and in truth been delivered to it. It was the habit and custom of defendant, and well known to plaintiffs to be such, after cottons were placed on the platforms at the compress in Greenville, before the same was compressed it would issue bills of lading therefor to consignors desiring to ship. Said cottons would be delivered to the compress for the purpose of compressing, and that at the time they were so delivered to it the superintendent of the compress or the agent of the compress would check out such cottons intended and the shipper would make out a bill of lading, which would be O K'd by the superintendent of the compress or its agent, and afterwards it would be brought to the agent of the defendant and by him signed up,

48 and defendant would actually receive said cotton only after it was compressed and delivered upon its cars. This course was pursued as a matter of convenience by the compress company and the shipper, but it was not intended by either the shipper or the defendant that the liability of the defendant should attach until the cotton was actually delivered upon its cars. This custom was well known to the plaintiffs, Geo. H. McFadden & Bro., and to A. Fulton & Co., and the bills of lading were made out according to this custom by A. Fulton & Co., as herein shown, and accepted by A. Fulton & Co. according to such custom. At the time said bills of lading were made the cotton was in the hands of the compress and according to the custom aforesaid, and had never been delivered to defendant, the defendant's liability as a common carrier had never attached, nor had any liability attached, but said cotton, while it was in the hands of the compress company, was wholly destroyed by fire and never came to the hands of defendant. Defendant says said cotton was placed on said platform at said compress for the purpose of being compressed by A. Fulton & Co.; that they well knew, intended, and expected said cotton should be compressed before it was shipped. Said cotton while at the compress was under the control of A. Fulton & Co. or their agent, the compress company.

Second. Defendant says that it is a corporation, duly and legally

incorporated under the laws of the State of Missouri; that it is a railway, and that its line of railway and especially that part of it over which said cotton was to be shipped, does not now, and at the time of the intended shipment did not, lie wholly in the State of Texas, but partially within said State and partially without said State; that in the manner aforesaid, in the last preceding paragraph in this answer,
49 defendant did deliver to A. Fulton & Co. its two certain bills of lading, which were by them duly assigned to plaintiffs, and plaintiffs are notified to produce said bills of lading on the trial of this cause or secondary evidence of the same will be given. Said bills of lading, with all the terms, conditions, and stipulations therein shown, were made and prepared by said A. Fulton & Co. and were presented to said railway company, and by it through its agent duly signed and returned by it to said A. Fulton & Co. and by them accepted as aforesaid. Defendant says that the shipment intended to be made under and by virtue of said two bills of lading were foreign shipments from the town of Greenville, in the State of Texas, in the United States of America, to the city of Liverpool, England, in the Kingdom of Great Britain; that said shipments were to be made along defendant's line of railway and through the port of Galveston, Texas, and over the high seas to the destination aforesaid, all of which will more fully appear from copies of said bills of lading hereto attached and marked "Exhibits A and B" and made a part of this petition as fully as if set out at length; that in said bills of lading and each of them it was specially stipulated and agreed that said Missouri Pacific Railway Company should not be liable for loss or damage for any article in said bills of lading named, meaning to include thereby said cottons, for loss or damage by fire or other casualty while in transit or while in deposit or place of transshipment or depots or landings or at the points of delivery. Defendant says that said cotton was at said compress at Greenville as aforesaid, near the depot of plaintiff; that if defendant's liability had at all accrued, then said cotton was at the place of delivery to de-
50 fendant, to wit, the place of deposit at the compress, and was there destroyed by fire as aforesaid. Defendant further says that whether or not said transit had commenced that under and by virtue of the terms of said bills of lading this defendant was excused from loss of said cotton by reason of fire. Defendant says that in said bills of lading it was specially agreed and stipulated, as more fully appears upon the face of same, that in accepting the bills of lading the shipper or agent of the owner of the property carried or to be carried expressly accepted and agreed to all its stipulations, exceptions, and conditions, none of which should be deemed to be rendered void by any custom of ports. Said bills of lading and stipulations and conditions aforesaid were made out by A. Fulton & Co. with all the stipulations, conditions, and terms aforesaid and therein shown and presented by said A. Fulton & Co. to defendant for the signature of its agent. The same were signed by said agent and were duly delivered to said A. Fulton & Co. and by them for a full and valuable consideration accepted, and they agreed to all the terms and conditions thereof and took the same subject to such

terms and conditions, and said bills of lading, with such terms and conditions thereto attached, have passed into the hands of plaintiffs, and they are subjected and bound by the same; and defendant says without fault or negligence on its part said cottons were, while at the compress in Greenville as aforesaid, destroyed by fire.

Fourth. If defendant is mistaken in its foregoing pleas, then defendant says that it is true that it did receive from plaintiff- for shipment, as by plaintiffs alleged, the cotton by plaintiffs named; that said cotton was delivered to defendant for such shipment at Greenville, Texas, and that defendant delivered to plaintiffs its
51 two certain bills of lading aforesaid for said cotton; that said bills of lading were made out by A. Fulton & Co. with all the terms and stipulations therein shown and were brought by said A. Fulton & Co. to defendant's agent for signature, and that defendant did execute said bills of lading and did deliver them to said A. Fulton & Co. with the terms and stipulations therein shown, to which said A. Fulton & Co. fully agreed; that among other things it was specially stipulated and agreed in said bills of lading, as therein more fully appears, that defendant should not be liable for loss or damage by fire while said cotton was in transit or at depots; and it was further stipulated in said bills that in accepting the same the shipper or agent of the owner of the property carried expressly accepted and agreed to all its exceptions and conditions.

Defendant says that after said cotton had been to it delivered as aforesaid and the bills of lading issued therefor and after the transit had commenced and while said cotton was in transit the same, without fault or negligense on the part of defendant, was destroyed by fire.

Defendant further pleads that said shipment was a foreign shipment from a point within the State of Texas, in the United States of America, through the port of Galveston, over the high seas to Liverpool, in England, in the Kingdom of Great Britain, and defendant is a corporation duly incorporated under the laws of the State of Missouri; that its line of railway now does not and at the time of said shipment did not lie wholly within the State of Texas, but partly within it and partly without it, and that said shipment was not to
52 be wholly within the State of Texas, but was to be partly within said State of Texas, through said port aforesaid, and over the high seas aforesaid on said bills of lading above shown.

Defendant prays that plaintiffs take nothing by their suit, and that defendant go hence and recover of plaintiffs all costs.

F. C. DILLARD,
Attorney for Defendant.

The exhibits to defendant's pleadings, marked respectively "Exhibit A" and "Exhibit B," are as follows:

Form 3038.

Foreign bill lading No. 46. Contract No. 250.

The Missouri Pacific Railway Company.

Shipped from Greenville, Texas, to Liverpool, England.

Shipped, in apparent good order, by A. Fulton & Co. the packages, property, or articles marked, numbered, and specified as below. Contents, gauge, value, and condition of contents unknown. Weights subject to correction.

Gross weight, 51,388 lbs.

Rate of freight: 136 cents per 100 lbs.

Marks and numbers: 50 P. U. G., 50 G. O. Z., 100.

Tags: 11418–11517.

One hundred (100) bales cotton. Notify Frederic Zerega & Co., Liverpool, Eng.

The property covered by this bill of lading is subject to all the conditions expresses in the customary forms of bills of lading in use by said steamships or steamship company at the time of shipment.

To be delivered in like good order and condition unto order
53 A. Fulton & Co. or to their assigns, he or they paying the freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of one hundred and thirty-six cts. p'r 100 lbs. gross invoice weight, with average accustomed (at $4.80 to the pound sterling) under the following terms and conditions, viz:

(1.) All goods or property under this bill of lading will be subject, at *its* owner's cost, to all necessary cooperage or baling.

(2.) That the said Missouri Pacific Railway Company and its connections which receives said property shall not be liable for rust of iron and of iron articles or for loss or damage by wet, dirt, fire, or loss of weight or for condition of baling on hay, hemp, or cotton, nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars, nor for damage to perishable property of any kind occasioned by delays from any cause or by changes of weather, nor for loss or damage on any article or property whatever by fire or other casualty while in transit or while in deposit of places of transhipment or at depots or landings at all points of delivery, nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. All goods or property under this bill of lading *is* to be transported to the depots of the companies or landings of the steamboats or forwarding lines at the points receipted to for delivery.

(3.) It is further agreed that the said Missouri Pacific Railway Company and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees or their agents at or by the next carrier beyond the point to which this bill of lading
54 contracts. Consignees are to pay freight and charges upon

the goods or merchandise in lots or parts of lots as they may be delivered to them.

(4.) It is further agreed and stipulated that in case of any loss, detriment, or damage to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage.

(5.) And it is further agreed that the amount of loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this bill of lading.

(6.) The Missouri Pacific Railway Company and its connections will not be accountable for gold, bullion, specie, jewelry, precious stones or metals unless so specified in the bills of lading and the value thereof declared therein.

(7.) It is further agreed that the said Missouri Pacific Railway Company have liberty to forward the goods or property to port of destination by any other steamer or steamship company than that named hereon; and this contract is executed and accomplished and the liability of the Missouri Pacific Railway Company as such common carriers thereunder terminates on the delivery of the goods or property to the steamship or steamship company or their agents at Galveston, when the responsibility of the steamship or steamship company commences, and not before.

(8.) And it is further agreed that the property shall be transported from the port of Galveston to the port of Liverpool, by the steamship Mallory and Cunard line, with the liberty to ship by any other steamship or steamship company, subject to the following terms and conditions, viz:

To be delivered from the steamship's deck, where the ship's responsibility shall cease, acts of God, the Queen's enemies, pirates, robbers, thieves, vermin, jettison, barratry of masters or mariners, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other person in the service of the ship (whether in navigating the ship or otherwise), restraints of princes, rulers of people, inaccuracies, obliteration or absence of marks, numbers, or address, loss or damage resulting from insufficiency of strength of packages, sweating, leaking, breakage, rain, spray, rust, decay, stowage, or contact with other goods, risk of lighterage, explosion or fire at sea, in craft, or on shore, before lading or after unlading, accidents from machinery, boilers, steam, or any other accidents of the seas, land, river, and steam navigation of whatever nature or kind soever excepted, however caused or originating (whether any one or more of such exceptions arise, occur, or in any way occasioned from or by the negligence, default, or error in judgment of the masters, mariners, engineers, or other- of the crew or any of the servants or employees of the ship-owners or otherwise however), and with liberty during the voyage to call at any port

or ports to receive fuel, to load or discharge cargo, or for any other purpose whatever, to sail with or without pilots, to tow and assist vessels in all situations, and in the event of said steamer being full of cargo or putting back to any port or being otherwise prevented from proceeding in the ordinary course of her voyage to
56 tranship the goods by any other steamer.

All fines, expenses, or losses by detention of or damage to vessel or cargo caused by incorrect or insufficient marking of the packages or describing the contents thereof shall be paid by the shipper or consignee of the goods, and the ship-owner has a lien upon the goods until the payment of all such costs, charges, or damages.

The master is at liberty to lighter the goods, if necessary, at ship's expense, but shipper's risk. Freight payable in cash, free of interest and discount, on the gross landing weight (freight on all liquids to be paid on in-take quantity). Goods, if any, which by special agreement herein are to be forwarded from port of discharge to any other port or place shall be so forwarded at ship's expense, but at the risk of the owner of the goods, and shall be subject to all conditions which may be exacted by the companies or individuals who may complete the transit.

Weights, measures, contents, quality, brand, and value unknown, and not answerable for leakage or breakage or incorrect delivery of goods arising from insufficiency of marks and numbers; not accountable for condition of bagging or country damage, if any. The goods to be taken from alongside by the consignee where the steamer discharges immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk of fire, loss, or injury in the warehouse provided for that purpose at port of discharge or sent to the public store, as the collector of the port shall direct, and, when deposited in the warehouse, to be subject to storage, the collector of the port being hereby authorized to grant a general
57 order for discharge immediately after entry of the ship; porterage of the delivery of the cargo to be done by the consignees of the steamer at the expense and risk of the receivers of the cargo.

In accepting this bill of lading the shipper or agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions, none of which shall be deemed to be rendered void by any customs of ports.

This bill of lading, duly indorsed by consignees, to be given up on demand to agents of steamer in exchange for ship's copy and order for delivery.

The liability of the Missouri Pacific Railway Company is hereby limited to its own lines of railway, and is to cease upon delivery to the next succeeding carrier of the articles specified herein.

In witness whereof the agent signing for the said railway and steamship or steamship companies hath affirmed to 3 bills of lading

of this tenor and date, one of which being accomplished the others to stand void.

Dated in Greenville, Nov. 12, 1887.

A. L. DOWNER,
Ag't Mo. Pac. R'y Co.,
Agents Severally but not Jointly.

EXHIBIT A.

Bonded goods. Consignee to furnish landing certificates free of expense to the carrier.

Attention of shippers is called to the act of Congress of 1851.

Any person or persons shipping oil of vitr-ol, unslacked lime, inflammable matches, or gunpowder in a ship or vessel taking cargo for divers persons on freight without delivering at the time of shipment a note in writing to the master, mate, or person or
58 persons in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars.

EXHIBIT "B."

Form 3038.

Foreign bill lading No. F 55. Contract No. 250.

The Missouri Pacific Railway Company.

From Greenville, Texas, to Liverpool, Eng.

Shipped, in apparent good order, by A. Fulton and Co. the packages, property, or articles marked, numbered, and specified as below. Contents, gauge, value, and condition of contents unknown. Weights subject to correction.

Gross weight, 51,736 lbs.

Rate of freight: 136 cents per 100 lbs.

Marks and numbers: 65 O. T. P., 20 G. U. P., 15 D. R. E.

Tags: 12408–12507.

One hundred (100) bales cotton. Notify Frederic Zerega and Co., Liverpool, Eng.

The property covered by this bill of lading is subject to all the conditions expresses in the customary forms of bills of lading in use by said steamships or steamship company at time of shipment.

To be delivered in like good order and condition unto order A. Fulton and Co. or to their assigns, he or they paying the freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of one hundred and thirty-six cts. p'r 100 lbs. gross invoice weight, with average accustomed (at $4.80 to the pound sterling) under the following terms and conditions, viz:

59 (1.) All goods or property under this bill of lading will be subject, at *its* owner's cost, to all necessary cooperage or baling.

(2.) That the said Missouri Pacific Railway Company and its connections which receives said property shall not be liable for rust of iron and of iron articles or for loss or damage by wet, dirt, fire, or loss of weight or for condition of baling on hay, hemp, or cotton, nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars, nor for damage to perishable property of any kind occasioned by delays from any cause or by changes of weather; nor for loss or damage on any article or property whatever by fire or other casualty while in transit or while in deposit of places of transhipment or at depots or landings at all points of delivery; nor for loss or damage by fire, collision, or the other dangers of navigation while on seas, rivers, lakes or canals. All goods or property under this bill of lading *is* to be transported to the depots of the companies or landings of the steamboats or forwarding lines at the points receipted to for delivery.

(3.) It is further agreed, that said Missouri Pacific Railway Company and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees, or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon goods or merchandise in lots, or parts of lots, as they may be delivered to them.

(4.) It is further stipulated and agreed, that in case of any loss, detriment or damage to, or sustained by, any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage.

(5.) And it is further agreed, that the amount of loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this bill of lading.

(6.) The Missouri Pacific Railway Company and its connections will not be accountable for gold, silver, bullion, specie, jewelry, precious stones or metals, unless so specified in the bills of lading and the value thereof declared therein.

(7.) And it is further agreed, that the said Missouri Pacific Railway Company have liberty to forward the goods or property to port of destination by any other steamer or steamship company than that named hereon; and this contract is executed and accomplished, and the liability of the Missouri Pacific Railway Company, as common carriers thereunder terminates on the delivery of the goods or property to the steamship or steamship company, or their agents, at Galveston when the responsibility of the steamship or steamship company commences, and not before.

(8.) And it is further agreed, that the property shall be transported from the port of Galveston to the port of Liverpool by the steamship Mallory & Cunard line with liberty to ship by any other

steamship or steamship company, subject to the following terms and conditions, viz:

61 To be delivered from the ship's deck, where the ship's responsibility shall cease, the acts of God, the queen's enemies, pirates, robbers, thieves, vermin, jettison, barratry of masters or mariners, misfeasance, error in judgment, negligence or default of pilots, master, mariner, engineers or other person in the service of the ship (whether in navigating the ship or otherwise), restraints of princes, rulers or people, inaccuracies, obliteration or absence of marks, numbers or address, loss or damage, resulting from insufficiency of strength of packages, sweating, leaking, breakage, rain, spray, rust, decay, stowage or contact with other goods, risk of lighterage, explosion, or fire at sea in craft or on shore, before lading or after unlading, accidents from machinery, boilers, steam or any other accidents of the seas, land, river and steam navigation of whatever nature or kind soever excepted, however caused or originating, (whether any one or more of all such exceptions arise, occur, or in any way occasioned from or by the negligence, default, or error in judgment of the masters, mariners, engineers or others of the crew or any of the servants or employés of the ship-owners, or otherwise however); and with liberty during the voyage to call at port or ports, to receive fuel, to load or discharge cargo, or for any other purpose whatever; to sail with or without pilots, to tow and assist vessels in all situations; and in the event of said steamer being full of cargo or putting back to any port, or being otherwise prevented from proceeding in the ordinary course of her voyage, to tranship the goods by any other steamer.

62 All fines, expenses, or losses by detention or of damage to vessel or cargo caused by incorrect or insufficient marking of the packages, or describing the contents thereof, shall be paid by the shipper or consignee of the goods; and the ship-owner has a lien upon the goods until the payment of all such costs, charges or damages.

The master is at liberty to lighter the goods, if necessary, at ship's expense, but shipper's risk. Freight payable in cash, free of interest and discount, on the gross landing weight (freight on all liquids to be paid on intake quantity). Goods, if any, which by special agreement herein are to be forwarded from port of discharge to any other port or place shall be forwarded at ship's expense, but at the risk of the owners of the goods, and shall be subject to all conditions which may be exacted by the companies or individuals who may complete the transit.

Weights, measures, contents, quality, brand and value unknown, and not answerable for leakage or breakage, or incorrect delivery of goods, arising from insufficiency of marks and numbers. Not accountable for condition of bagging or country damage, if any. The goods to be taken from alongside by the consignee, where the steamer discharges, immediately the vessel is ready to discharge, or otherwise they will be landed by the master, and deposited at the expense of the consignee and at his risk of loss or injury or fire, in the warehouse provided for that purpose at port of discharge, or

sent to the public store, as the collector of the port shall direct, and when deposited in the warehouse to be subject to storage, the collector of port being hereby authorized to grant a general order for discharge, immediately after entry of the ship. Porterage of the delivery of the cargo to be done by the consignees of the steamer, at the expense and risk of the receivers of the cargo.

In accepting this bill of lading, the shipper, or agent of the
63 owner of the property carried, expressly accepts and agreed to all its stipulations, exceptions and conditions, none of which shall be deemed to be rendered void by any customs of ports.

This bill of lading, duly indorsed by consignees, to be given up on demand to agents of steamer, in exchange for ship's copy and order for delivery.

The liability of the Missouri Pacific Railway Company is hereby limited to its own lines of railway, and is to cease upon delivery to the next succeeding carrier of the articles specified herein.

In witness whereof, the agent signing for the said railway and steamship or steamship companies hath affirmed to 3 bills of lading, of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Greenville Tex. Nov. 14, 1887.

A. L. DOWNER,
Ag't Mo. Pac R'y Co., Agents Severally, but not Jointly.

EXHIBIT "B."

Bonded goods—Consignee to furnish landing certificates free of expense to the carrier.

Attention of shippers is called to the act of Congress of 1851:

"Any person or persons shipping oil of vitr-ol, unslacked lime, inflammable matches or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note, in writing, expressing the nature and character of such merchandise, to the master, mate, or person or persons in charge of the loading of the ship or vessel shall forfeit to the United States one thousand dollars."

The demurrers and exceptions to said counts that are contained in plaintiffs' first supplemental petition, filed herein on the
64 3rd day of June, 1890, are as follows:

1st. The general exception that said amended answer was insufficient in law, and they specially excepted to the first count in defendant's special answer, in so far as the same attempts to set up a custom of the manner of receiving cotton and issuing bills of lading, because the same does not show that the custom was such as is recognized and binding in law, but attempts to set up a custom which is contrary to law, and because the same does not show that it was such a custom as would relieve the defendant from liability on a contract in writing.

2nd. They except to the second and fourth counts in said special

answer, in so far as the same attempts to set up a contract to excuse the defendant from any liability by reason of damage by fire or other casualty, because said plea shows that the said contract was entered into in the city of Greenville, in the State of Texas, and was therefore governed and controlled by the law of the State of Texas, which prohibits the execution of such contracts as the one set forth by defendant.

3rd. Plaintiff- excepts to that part of said answer which attempts to set up an agreement to be bound by the custom of ports, because the same is not shown to be material or relevant to this cause.

65 4th. Plaintiffs except to that part of said answer which sets up that the plaintiffs had the cotton in controversy insured for its full value, because the same is immaterial and irrelevant to the controversy herein and constitutes no defense in law to the plaintiffs' cause of action.

And the court then and there sustained each of said exceptions, to which defendant then and there excepted; and thereupon the parties in writing duly waived the jury and stipulated that the case might be tried before the court; whereupon both parties announced ready for trial, and the plaintiffs, to sustain their issues, offered in evidence the following evidence:

1st. The bills of lading, exact copies of which are exhibits to defendant's answer, as above shown.

2nd. It was admitted that said bills had been assigned by A. Fulton & Co. to plaintiffs.

3rd. It was agreed that the cotton in controversy was the property of Geo. H. McFadden & Bro., and that it was destroyed by fire at Greenville, Texas, on the 14th day of Nov., 1887, subsequent to the time of the execution of the bills of lading.

4th. It was further agreed that said cotton was of the value of $8,747.83 at Greenville, Texas, at the time it was destroyed.

5th. It was further agreed that defendant never paid plaintiffs for said cotton or any part thereof.

The above evidence was all the evidence introduced upon the trial of the cause, and upon it the court found the facts specially, and his findings and conclusions thereon are as follows:

66 *Findings and Conclusions of the Court.*

The court approves the agreement as to evidence introduced made by the attorneys in the cause and above shown, and finds the facts therefrom as follows:

1st. Defendant executed and delivered to A. Fulton & Co. the bills of lading by plaintiff declared upon, and which are fully shown as "Exhibit A" and "Exhibit B" to defendant's first amended original answer; said bills of lading were duly assigned by A. Fulton & Co. to plaintiffs.

2nd. The cotton named in said bills of lading *were* destroyed by fire, at Greenville, Texas, on the 14th day of Nov., 1887, subsequent to the date of the execution and delivery of said bills of lading to

A. Fulton & Co.; said cotton was then the property of Geo. H. McFadden & Bro., and was then and there of the value of $8,647.83. Defendant has never paid plaintiff for said cotton or any part thereof.

From these facts the court concludes—

1st. The bills of lading, being executed and delivered in the State of Texas for a shipment originating in said State, must be construed in accordance with the statute law of said State and be held to have intended to be governed by such law. In accordance with said law, all stipulations in said bills releasing defendant from loss or damage by reason of fire *is* absolutely void. After the signing of said bills by defendant its duty and liability as a common carrier commenced, and after such time it would be responsible for any loss or damage save such as it could excuse itself from at common law, irrespective of contract.

2nd. Plaintiff will have judgment against defendant for
67 $8,647.83, with interest from Nov. 14th, 1887, at the rate of 8 per cent. per annum.

A. P. McCORMICK, *Judge.*

To which conclusions of the court upon the facts by him found and to the judgment by the court rendered defendant then and there excepted. This bill of exception, at the request of the parties hereto, is duly allowed and approved by me, the said A. P. McCormick, judge, and made a part of the record in this case, and I hereto set my hand and seal, in term time of said court, on this the 5th day of June, 1890.

A. P. McCORMICK,
U. S. Dist. Judge.

The foregoing is endorsed as fol-ows, to wit:

#1219. Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Bill of exceptions. Filed June 9th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

68 UNITED STATES OF AMERICA, }
Northern District of Texas. }

To the honorable justices of the supreme court:

And now comes the Missouri Pacific Railway Company, a corporation, by F. C. Dillard, their attorney, and complain that in the record and proceedings and also in the rendition of the judgment in the suit between Geo. H. McFadden, John H. McFadden, and J. Franklin McFadden, composing the firm of Geo. H. McFadden & Bro., plaintiffs, and said railway company, defendants, tried in the circuit court of the United States for the northern district of Texas, at Dallas, at the May term thereof, 1890, manifest error hath intervened, to the great damage of your petitioners. Wherefore they

pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the supreme court aforesaid.

HEAD & DILLARD,
Counsel for Petitioners.

F. C. DILLARD, *Of Counsel.*

Allowed.

____ ____,
U. S. District Judge, Presiding over the Circuit Court at the Trial of said Cause.

The foregoing is endorsed as follows, to wit:
Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Application for writ of error. Filed Aug. 7th, 1890. J. H. Finks, clerk, by Chas. A. Richardson, deputy.

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between George H. McFadden, John H. McFadden, and Franklin McFadden, composing the firm of George H. McFadden & Brother, plaintiffs, and The Missouri Pacific Railway Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Missouri Pacific Railway Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 7th day of August, in the year of our Lord one thousand eight hundred and ninety.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS,
Clerk of the U. S. Circuit Court, Northern District of Texas,
By C. A. RICHARDSON, *Deputy.*

Citation on the above writ of error is hereby waived, and we hereby acknowledge and accept service of this writ of error this the 7th day of August, A. D. 1890.

LEAKE, SHEPARD & MILLER,
Att'ys for Plaintiffs, George H. McFadden & Bro.

70 I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that the above and foregoing writ of error was filed in my office on this the 7th day of August, 1890, and a true and exact copy thereof on said day lodged in my said office.

Witness my hand & seal of said court at office, in Dallas, Texas, this August 7th, 1890.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS, *Clerk*,
By C. A. RICHARDSON, *Deputy*.

[Endorsed:] Geo. H. McFadden & Bro. *vs.* The Missouri Pacific Railway Company. Writ of error. Filed Aug't 7th, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

71 GEO. H. MCFADDEN & BROS. *vs.* MISSOURI PACIFIC R'Y CO. } #1219.

JUNE 4TH, 1890.

This day came the parties, and then came on to be heard the plaintiffs' demurrer and exceptions to the defendant's first amended original answer, filed June 3d, 1890, and, the same having been heard by the court, it is considered that the demurrer and exceptions are well taken.

It is therefore ordered and adjudged that each and every demurrer and exception contained in the plaintiffs' first supplemental petition to the defendant's first amended original answer be, and the same are hereby, sustained; to which action of the court defendant then and there excepted.

And then the parties announced ready for trial on the issues of fact, and, having signed a stipulation waiving a jury in said cause, agreed to submit the matters of fact as well as of law to trial by the court, and, the evidence having been heard, it is considered that the facts are with the plaintiffs.

It is therefore ordered and adjudged by the court that the plaintiffs, Geo. H. McFadden and Bro., a copartnership composed of George H. McFadden, John H. McFadden, and Franklin McFadden, do have and recover of the defendant, The Missouri Pacific R'y Co., the sum of ten thousand four hundred and fifteen and $\frac{80}{100}$ ($10,415.80) dollars, with interest thereon from this date at the rate of 8 % per annum, together with all costs in this behalf incurred and expended, for which let execution issue.

And defendant excepts to this judgment of the court and to the

rendering of judgment for plaintiffs for that upon the facts
72 found judgment should be for defendant.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also the rendition of a judgment of a plea which is in the said circuit court, before you or some of you, between George McFadden, John H. McFadden, and Franklin McFadden, composing the firm of Geo. H. McFadden & Bro., plaintiffs, and The Missouri Pacific Railway Co., defendant, a manifest error hath happened, to the great damage of the said Missouri Pacific Railway Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL] of said Supreme Court, the 7th day of August, in the year of our Lord one thousand eight hundred and ninety.

73 J. H. FINKS,
Clerk of U. S. Circuit Court, Northern District of Texas,
By C. A. RICHARDSON, *Deputy.*

Citation on the above writ of error is hereby waived, and we hereby acknowledge and accept service of this writ of error this the 7th day of August, A. D. 1890.

LEAKE, SHEPARD & MILLER,
Att'ys for Plaintiffs, Geo. H. McFadden & Bro.

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that the above and foregoing writ of error was filed in my office on this the 7th day of August, 1890, and a true and exact copy thereof on said day lodged in my said office.

Witness my hand and seal of said court, at office, in Dallas, Texas, this August 7th, 1890.

[SEAL.] J. H. FINKS, *Clerk,*
By C. A. RICHARDSON, *Deputy.*

Endorsed: Geo. H. McFadden & Bro. *vs.* The Missouri Pacific Railway Co. Writ of error. Filed Aug. 7th, 1890. J. H. Finks, clerk, by C. A. Richardson, d'p'ty. In the United States circuit court for the northern district of Texas, at Dallas.

I, J. H. Finks, clerk of the United States circuit court for the northern district of Texas, at Dallas, do hereby certify that
74 the foregoing is a full, true, and correct transcript of the judgment and of writ of error, waiver of citation, and endorsements in case # 1219 and styled Geo. H. McFadden & Bro. *vs.* Missouri Pacific Railway Co., all of which appears from the records of the said court now in the clerk's office.

In testimony whereof I hereunto affix the seal of said court, at Dallas, Texas, and sign the name of the clerk thereof this 7th day of Aug., A. D. 1890.

J. H. FINKS,
Clerk of said Circuit Court,
By C. A. RICHARDSON,
Deputy Clerk.

The foregoing is endorsed as follows, to wit:

1219. United States circuit court, northern district of Texas, at Dallas. Geo. H. McFadden & Bro. *versus* Missouri Pacific R'y Co. Certified copy of judgment and of writ of error with endorsements for Messrs. Head & Dillard. Fee, $1.25.

GEORGE H. MCFADDEN & BROTHER
vs.
MISSOURI PACIFIC RAILWAY COMPANY.

To the honorable chief justice and associate justices of the Supreme Court of the United States:

Now comes the Missouri Pacific Railway Company and shows unto your honors that heretofore, to wit, on the 4th day of June, 1890, in the United States court for the northern district of Texas, sitting at Dallas, and held by the Honorable Andrew P. Mc-
75 Cormick, district judge, sitting alone in a certain cause therein pending, wherein Geo. H. McFadden, John H. McFadden, and Franklin McFadden, composing the firm of Geo. H. McFadden & Bro., were plaintiffs and The Missouri Pacific Railway Company, a corporation, was defendant, judgment was rendered in behalf of plaintiffs for the sum of ten thousand four hundred and fifteen and $\frac{80}{100}$ ($10,415.80) dollars, together with 8% per annum interest thereon from the date of the rendition of said judgment until paid.

In said cause the firm of Head & Dillard was counsel representing said defendant railway company. These counsel are subject to the control of the general attorneys of said railway company, Baker, Botts & Baker, residing at Houston, Texas. This firm in turn is subject to the control of Honorable Alexander Cochran, general solicitor of the Missouri Pacific Railway Co., and he in turn is subject to the control of the general management of said railway Co.

Before any case can be carried up by writ of error or appeal it is necessary for the firm of Head & Dillard, having charge of such case, to submit the matter to said firm of Baker, Botts & Baker, and said firm in turn frequently have to submit it Alexandr Cochran, and he in turn frequently has to obtain instructions from the management. The defendant is a large corporation, operating many miles of railway and controlling many men, and in the carrying on of its business it is necessary for its legal business to pass frequently in the channels aforesaid, and thus much time is necessarily consumed.

Immediately after the rendition of said judgment referred to the firm of Head & Dillard notified said firm of Baker, Botts & Baker by wire of the result of the judgment, and shortly thereafter
76 followed said wire with a letter, laying before said general counsel the results of the case and asking instructions as to carrying it up by writ of error and filing supersedeas bond. Said general counsel had to refer said matters to said general solicitor and he in turn to examine the matter fully and, as this firm of Head & Dillard firmly believes, to confer with the management of the railway. Owing to this fact instructions were not delivered to the firm of Head & Dillard to carry this case up by writ of error until about fifty-three of fifty-four days, Sundays exclusive, after the rendition of said judgment. Said Head & Dillard forthwith after receiving instructions to sue out a writ of error and to obtain supersedeas, which instructions were received at the time last aforesaid, went to the city of Dallas and sued out a writ of error before the clerk of the court, where said trial was had, and service of said writ of error was duly accepted and citation thereon was duly waived by the firm of Leake, Shepherd & Miller, who were counsel representing plaintiffs in said suit. At said time and place it was the desire of the Missouri Pacific Railway Company to obtain supersedeas, and it was then and there ready, willing, and able to give a full bond for obtaining such supersedeas, but the Honorable Andrew P. McCormick was at said time without the State of Texas, to wit, at Waukesha, in the State of Wisconsin, a distance of about sixteen or eighteen hundred miles from the city of Dallas. Before he could have been conferred with and approved the bond and the bond have been filed with the clerk the time for filing the same would have expired. Said Honorable Andrew P. McCormick left the State of Texas shortly after the rendition of said judgment, to wit, about the 9th or 10th of June, and has not
77 been within the State of Texas since leaving it. For this reason it was impossible to file a supersedeas bond approved by the Honorable Andrew P. McCormick within the time allowed by law, but, as above appears, writ of error was obtained within said time, to wit, on the 7th day of August, 1890, and service of the same was duly had within said time.

Since instructions were received by the firm of Head & Dillard to carry up said cause by writ of error H. O. Head, of said firm, has been absent from the State of Texas until only recently and in the State of Tennessee. F. C. Dillard, upon his return from Dallas,

found in his family serious sickness, resulting, on the 10th day of August, in the death of a member of his family, and for this reason was delayed in earlier filing this application for writ of error. At about this time O. T. Lyon, one of the bondsmen who was to act for the Missouri Pacific Railway Company, left the State, returning only about the latter part of August, necessitating further delay.

There is annexed hereto and made a part of this application a certified copy of the judgment rendered in said cause, of the writ of error and the service of the same.

There is also tendered herewith a good and sufficient bond in the sum of sixteen thousand ($16,000.00) dollars.

Premises considered, the Missouri Pacific Railway Company prays that said bond be accepted, that supersedeas be granted, that citation issue, and, as in duty bound, will ever pray.

HEAD & DILLARD,
Att'ys for Missouri Pacific R'y Co.

On this day personally appeared before me, the undersigned authority, F. C. Dillard, who, being by me duly sworn, on his oath says that the matters and things stated in the foregoing peti-
78 tion are true.

F. C. DILLARD.

Sworn to and subscribed before me this 2nd day of September, A. D. 1890.

[SEAL.] Witness my hand and seal of office day and date above written.

W. B. JAYNES,
Notary Public, Grayson Co., Texas.

IN CHAMBERS, BETHLEHEM,
NEW HAMPSHIRE, *Sept. 9th*, 1890.

It is ordered that a writ of supersedeas be issued as prayed for in the above petition.

L. Q. C. LAMAR,
Circuit Justice.

The foregoing is endorsed as follows, to wit:

Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Application for supersedeas. Filed Sept. 17th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

79 GEORGE H. MCFADDEN & BROTHER
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Know all men by these presents that we, the Missouri Pacific Railway Company, a corporation, and Sam. Hanna and O. T. Lyon, are held unto George H. McFadden and Brother in the full and just sum of sixteen thousand ($16,000.00) dollars, to be well and truly paid to the said George H. McFadden, John H. McFadden, and Frank-

lin McFadden, their heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, signed with our hands, and dated this 25th day of August, A. D. 1890.

Now, whereas lately, at a term of the United States circuit court for the northern district of Texas, sitting at Dallas, to wit, on the 4th day of June, 1890, in a suit pending in said court between George H. McFadden, John H. McFadden, Franklin McFadden, forming the copartnership of George H. McFadden & Brother, as plaintiffs, and The Missouri Pacific Railway Company, as defendant, judgment was rendered against the said Missouri Pacific Railway Company for the sum of ten thousand four hundred and fifteen and $\frac{80}{100}$ ($10,415.80) dollars, with the interest thereon from the date of judgment at the rate of 8 % per annum, and all costs in the suit incurred; and the said Missouri Pacific Railway Co. having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and service of said writ of error having been duly and properly
80 accepted and all time and notice having been duly waived and citation directed to the said George H. McFadden, John H. McFadden, and Franklin McFadden, citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington on the 2nd Monday of October next, being duly issued at the time of the approval and acceptance of this bond:

Now, therefore, the condition of the above obligation is such that if the said Missouri Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then this obligation to be void; else to remain in full force and effect.

THE MISSOURI PACIFIC RAILWAY CO.,
By F. C. DILLARD, *Its Att'y.* [SEAL.]
SAM. HANNA. [SEAL.]
O. T. LYON. [SEAL.]

STATE OF TEXAS, }
Grayson County. }

On this day personally appeared before the undersigned, a notary public, Sam. Hanna, surety on the above bond, who, being by said notary public duly sworn, on his oath doth say that he, the said Sam'l Hanna, is worth over and above and beyond all his exemptions and liabilities subject to execution the sum of twenty-five thousand dollars.

This August 25th.

[SEAL.]

A. H. COFFIN,
Notary Public, Grayson Co., Texas.

81 STATE OF TEXAS, }
County of Grayson. }

Before me, the undersigned authority, on this day personally appeared O. T. Lyon, surety on the above bond, who, being by said

authority duly sworn, on his oath says that he is worth above all exemptions and liabilities subject to execution the sum of seventy-five thousand dollars.

This August 30th, 1890.

J. P. AUSTIN,

[SEAL.] *Clerk of County Court, Grayson County, Texas.*

The within bond approved by me—

L. Q. C. LAMAR,
Circuit Justice.

The foregoing is endorsed as follows, to wit:

Geo. H. McFadden & Bro. *vs.* Mo. Pac. R'y Co. Supersedeas bond. Filed Sept. 17th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, d'p'ty.

82 *Assignment of Errors.*

GEORGE H. MCFADDEN & BROTHER
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Now comes the defendant, The Missouri Pacific Railway Company, and says that there is manifest error in the trial and record of this cause, and in this behalf it files the following assignments of error, to wit:

1. The court erred in sustaining the general exception and the special exceptions to the first count in defendant's first amended original answer, for the matters in said count were well and sufficiently pleaded and constituted a good defense to plaintiffs' cause of action, because although the bills of lading were signed and delivered, yet when this was done for the convenience of the shipper before the actual delivery of the cotton to the railway and with the understanding that the liability of the defendant as a carrier under the bill of lading should not attach until the actual delivery of the cotton to it, then would defendant not be liable prior to the time of such delivery for any injury befalling the cotton.

2. The court further erred in sustaining said exceptions to said first count, because said count alleged that said cotton while at the compress was under the control of said A. Fulton & Company or their agent and was placed there by said A. Fulton and Company to be compressed before shipment, and if this were true defendant would not be liable for its destruction.

83 3. The court erred in sustaining the general exception and special exceptions to the second and fourth counts in defendant's said answer, because the matters alleged in said counts were well and sufficiently pleaded and constituted a good defense to plaintiffs' cause of action. The shipment was a shipment from a point within the State of Texas through the port of Galveston over the high seas to Liverpool, England, and the stipulation in the bill of lading that defendant should not be responsible for loss caused by fire was a good, valid, and binding contract, and, the loss occur-

ring by fire, defendant was not liable for such loss while said cotton was in place of deposit or transit or even after the carriage had commenced.

4. The court erred in his conclusions of law and in giving judgment for plaintiffs, because from the facts found by him judgment should not have been for plaintiffs, but for defendant, and especially from said facts found by the court should judgment have been for defendant, because it appears from the bills of lading, which the court found to have been duly executed, that the shipment was a shipment from Greenville, Texas, to Liverpool, England, and that said cotton was destroyed by fire, and under the terms of said bill of lading the defendant was not liable for its destruction from such cause.

5. The court erred in his first conclusion of law in holding that the statute law of Texas would govern the shipment, for the shipment being a foreign shipment from Greenville, Texas, to Liverpool, England, the parties might make a valid contract as to
84 relieving the defendant from liability, and the statute laws of Texas would in no way apply to it.

6. The court erred in holding that the statute law of Texas could in any event have any effect upon this shipment, because said law professes to apply only to a carriage wholly within the State of Texas, said law being as follows: "Railroad companies and other common carriers of goods, wares, and merchandise for hire within this State on land or in boats or on vessels on the waters entirely within the body of this State shall not limit or restrict their liability as it exists at common law by any general or special notice or by inserting exceptions in a bill of lading or memorandum given upon receipt of goods for transportation or in any manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid." (Rev. Stat. Tex., art. 2781.)

7. Upon the facts found by the court, the court erred in not rendering judgment for defendant, because it appears therefrom that the cotton was destroyed by fire, and the defendant, by a good and valid contract, was not liable for any destruction caused in this way.

HEAD & DILLARD,
Att'ys for Defendant, Mo. Pac. R'way Co.

The foregoi-g has the following endorsement:
McFadden & Bro. *vs.* Mo. Pac. R'y Co. Assignments of error. Filed Sep. 30, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

85 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States within and for the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in cause numbered 1219, wherein Geo. H. McFadden & Bro. are plaintiffs and The Missouri Pacific Railway Company is defendant, lately pending in said court, at

Dallas, Texas, except that the original writ of error is included therein instead of a copy thereof.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.

In testimony whereof I have hereunto affixed the seal of said court, at Dallas, Texas, and signed the name of the clerk thereof, on this the 3rd day of October, A. D. 1890.

J. H. FINKS,
Clerk of said Court,
By CHAS. H. LEDNUM, *Deputy.*

Endorsed on cover: Case No. 14,365. N. Texas C. C. U. S. No. 318. The Missouri Pacific Railway Company, plaintiff in error, *vs.* George H. McFadden, John H. McFadden, and Franklin McFadden, composing the firm of George H. McFadden & Brother. Filed October 21, 1890.

154-155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

Term No. 618.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
GEORGE H. MCADDEN, JOHN H. MCADDEN AND FRANCIS MCADDEN, CONSTITUTING THE HEIRS OF GEORGE H. MCADDEN & BROTHER,
Defendants in Error.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Statement, Points and Authorities, and Argument.

JAMES HAGERMAN,
JOSEPH H. MCKENNEY,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

Term No. 318.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
GEORGE H. McFADDEN, JOHN H. McFADDEN AND FRANKLIN McFADDEN, COMPOSING THE FIRM OF GEORGE H. McFADDEN & BROTHER,
DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Statement, Points and Authorities, and Argument.

STATEMENT.

This was an action brought by defendants in error in the District Court of Hunt County, Texas, May 12, 1888, to

recover $10,312.40, value of two hundred (200) bales of cotton alleged to have been delivered to the plaintiff in error at Greenville, Texas, for shipment to Liverpool, England, and destroyed by fire November 14, 1887, while at Cotton Compress in Greenville, but after bills of lading had been issued. The two hundred bales of cotton were covered by two bills of lading, alike in all particulars, except that one is dated November 12, 1887, and the other November 14, 1887, the former being for 51,388 pounds and the latter for 51,726 pounds and which bills of lading were of tenor, as follows:—

"Foreign Bill Lading No. F , Contract No. .

THE MISSOURI PACIFIC RAILWAY COMPANY.

From Greenville, Texas, to Liverpool, England.

Shipped, in apparent good order, by A. Fulton & Co., the packages, property or articles marked, numbered, and specified as below. Contents, gauge, value, and condition of contents unknown.

* * * * * * * * * * * *

One hundred bales cotton. Notify Frederic Zarega & Co., Liverpool, England.

The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or steamship company at the time of shipment. To be delivered in like good order and condition unto order A. Fulton & Co., or to their assigns, he or they paying the freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of one hundred and thirty-six cts. per 100 lbs., gross invoice weight, with average accustomed (at $4.80 to the pound sterling) under the following terms and conditions, viz.: —

(1) All goods or property under this bill of lading will be subject, at its owner's cost, to all necessary cooperage or baling.

(2) That the said Missouri Pacific Railway Company and its connections which receives said property shall not be liable for rust of iron and of iron articles or for loss or damage by wet, dirt, *fire*, or loss of weight or for condition of baling on hay, hemp or cotton, nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars, nor for damage to perishable property of any kind occasioned by delays from any cause or by changes of weather, *nor for loss or damage on any article or property whatever by fire or other casualty while in transit or while in deposit of places of transshipment or at depots or at landings at all points of delivery, nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals.* All goods or property under this bill of lading is to be transported to the depots of the companies or ladings of the steamboats or forwarding lines at the points receipted to for delivery.

(3) It is further agreed that said Missouri Pacific Railway Company and its connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees or their agents at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts of lots as they may be delivered to them.

(4) It is further agreed and stipulated that in case of any loss, detriment or damage to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may occur, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage.

(5) And it is further agreed that the amount of loss or damage so accruing, so far as it shall fall on the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this bill of lading.

(6) The Missouri Pacific Railway Company and its connections will not be accountable for gold, silver, bullion,

specie, jewelry, precious stones or metals unless so specified in the bill of lading and the value thereof declared therein.

(7) It is further agreed that the said Missouri Pacific Railway Company have liberty to forward the goods or property to port of destination by any other steamer or steamship company than that named hereon; and this contract is executed and accomplished and the liability of the Missouri Pacific Railway Company as common carriers thereunder terminates on the delivery of the goods or property to the steamship or steamship company or to their agents at Galveston, when the responsibility of the steamship or steamship company commences, and not before.

(8) And it is further agreed that the property shall be transported from the port of Galveston, Texas, to the port of Liverpool, England, by the steamship Mallory and Cunard lines, with liberty to ship by any other steamship or steamship company, subject to the following terms and conditions, viz.: —

To be delivered from the ship's deck, where the ship's responsibility shall cease, the acts of God, the Queen's enemies, pirates, robbers, thieves, vermin, jettison, barratry of masters or mariners misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other person in the service of the ship (whether in navigating the ship or otherwise), restraints of princes, rulers of people, inaccuracies, obliterations or absence of marks, numbers, or address, loss or damage resulting from insufficiency of strength of packages, sweating, leaking, breakage, rain, spray, rust, decay, stowage, or contact with other goods, risk of lighterage, explosion or fire at sea, in craft, or on shore, before lading or after unlading, accidents from machinery, boilers, steam, or any other accidents of the seas, land, river, and steam navigation of whatever nature or kind soever excepted, however caused or originating (whether any one or more of all such exception arise, occur, or in any way occasioned from or by the negligence, default, or error in judgment of masters, mariners, engineers, or others of the crew or any of the servants or employes of the ship-owners or otherwise however), and with liberty during the voyage to call at any port or ports to receive fuel, to load or discharge cargo, or

for any other purpose whatever, to sail with or without pilots, to tow and assist vessels in all situations, and in the event of said steamer being full of cargo or putting back to any port or being otherwise prevented from proceeding in the ordinary course of her voyage to transship the goods by any other steamer.

All fines, expenses, or losses by detention of or damage to vessels or cargo caused by incorrect or insufficient marking of the packages or describing the contents thereof shall be paid by the shipper or consignee of the goods, the ship-owner has a lien upon the goods until the payment of all such costs, charges, or damages. The master is at liberty to lighter the goods, if necessary, at ship's expense, but shipper's risk. Freight payable in cash, free of interest and discount, on the gross landing weight (freight on all liquids to be paid on intake quantity). Goods, if any, which by special agreement herein are to be forwarded, from port of discharge to any other port or place shall be so forwarded at ship's expense, but at the risk of the owners of the goods, and shall be subject to all conditions which may be exacted by the companies or individuals who may complete the transit.

Weights, measures, contents, quality, brand, and value unknown, and not answerable for leakage or breakage or incorrect delivery of goods arising from insufficiency of marks and numbers; not accountable for condition of bagging or country damage, if any. The goods to be taken from alongside by the consignee where the steamer discharges immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee, and at his risk of fire, loss or injury in the warehouse provided for that purpose at port of discharge or sent to public store, as the collector of the port shall direct, and, when deposited in the warehouse to be subject to storage, the collector of port being hereby authorized to grant a general order for discharge immmediately after the entry of a ship; porterage of the delivery of the cargo to be done by consignees of the steamer at the expense and risk of the receiver of the cargo.

In accepting this bill of lading the shipper or agent of

the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions, none of which shall be deemed to be rendered void by any customs of ports.

This bill of lading, duly indorsed by consignees, to be given up on demand to agents of steamer in exchange for ship's copy and order of delivery.

The liability of the Missouri Pacific Railway Company is hereby limited to its own lines of railway and is to cease upon delivery to the next succeeding carrier of the articles specified herein.

In witness whereof, the agent signing for the said railway and steamship companies hath affirmed to three (3), bills of lading of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Greenville, Texas, November —, 1887.

(Signed) A. L. DOWNER, Agent.

Agents severally, but not jointly.

(Signed O. K.) W. H. MURPHY, Sup't."

Defendants in error were the owners of the cotton covered by these bills of lading by assignment from A. Fulton & Co., the consignors.

The suit was removed to the United States Circuit Court for the Northern District of Texas by the plaintiff in error, where, on June 3d, 1890, it filed its first amended original answer in the words and figures following: —

Geo. H. McFadden & Bros.
vs.
Missouri & Pacific Ry. Co.

Suit pending in the U. S. Circuit Court for the Northern District of Texas, at Dallas.

Now comes the defendant, leave of court being first had, and files this his first amended original answer amending its

original answer herein filed on the day of 1888, and for such amendment says that it excepts to plaintiff's petition, and that the same is insufficient in law, and of this it prays judgment.

For answer defendant denies all and singular the allegations by plaintiff made and demands strict proof thereof.

For special answer defendant says:—

First. That while it is true that it has issued certain bills of lading for said cotton, said cotton has not yet in deed and in truth been delivered to it. It was the habit and custom of defendant, and well known to plaintiff to be such, after cottons were placed on the platform at the compress in Greenville, before the same was compressed it would issue bills of lading therefor to consignors desiring to ship. Said cottons would be delivered to the compress for the purpose of compressing, and that at the time they were so delivered to it the superintendent of the compress or agent of the compress would check out such cottons intended, and the shipper would make out a bill of lading, which would be O. K'd by the superintendent of the compress or its agent and afterwards it would be brought to the agent of defendant and by him signed up, and defendant would actually receive said cotton only after it was compressed and delivered upon its cars. This course was pursued as a matter of convenience by the compress company and the shipper, but it was not intended by either the shipper or defendant that the liability of defendant should attach until the cotton was actually delivered upon its cars. This custom was well

known to the plaintiffs, Geo. H. McFadden & Bro., and to A. Fulton & Co., and the bills of lading were made out according to this custom by A. Fulton & Co., herein shown, and accepted by A. Fulton & Co. according to such custom. At the time said bills of lading were made the cotton was in the hands of the compress, and according to the custom aforesaid, and had never been delivered to defendant, the defendant's liability as a common carrier had never attached nor had any liability attached, but said cotton, while it was in the hands of the compress company, was wholly destroyed by fire and never came to the hands of the defendant. Defendant says that said cotton was placed on said platform and at said compress for the purpose of being compressed by said A. Fulton & Co.; that they well knew, intended, and expected that said cotton should be compressed before it was shipped. Said cotton while at the compress was under the control of A. Fulton, or its agent, the Compress Company.

Second. Defendant says that it is a corporation duly and legally incorporated under the laws of the State of Missouri; that it is a railway, and that its line of railway, and especially that part of it over which said cotton was to be shipped, does not now and at the time of said intended shipment did not lie wholly within the State of Texas, but partly within said State and partly without said State; that in the manner as aforesaid in the last preceding paragraph in this answer defendant did deliver to A. Fulton & Co., its two certain bills of lading, which were by them duly assigned to plaintiffs and plaintiffs are notified to produce said bills of lading on the trial of this cause or secondary evidence of the same will be given. Said bills of lading, with all the terms, conditions and stipulations therein shown, were made and prepared by said A. Fulton & Co., and were presented to said railway company and by it

through its agent duly signed and returned by it to said railway company and by them accepted as aforesaid. Defendant says that the shipment intended to be made under and by virtue of said two bills of *lading were foreign shipments from the town of Greenville, in the State of Texas, in the United States of America, to the city of Liverpool, in England, in the Kingdom of Great Britain: that said shipments were to be made along the defendant's line of railway and through the port of Galveston and over the high seas to the destination aforesaid;* all of which will more fully appear from copies of said bills of lading hereto attached and marked "Exhibit A" and "Exhibit B" and made a part of this petition as fully as if set out at length; that in said bills of lading and each of them it was especially stipulated and agreed that said Missouri Pacific Railway Company should not be liable for loss or damage of any article in said bills of lading named, meaning to include thereby said cottons, for loss or damage by fire or other casualty while in transit or while in deposit or place of transshipment or depots or landings or at the points of delivery.

Defendant says that said cotton was at said compress of Greenville as aforesaid, near the depot of plaintiff; that if defendant's liability had at all accrued, then said cotton was at the place of delivery to defendant, to wit, the place of deposit at the compress, and was there destroyed by fire as aforesaid. *Defendant further says that whether or not said transit had commenced that under and by virtue of the terms of said bills of lading this defendant was excused from loss of said cotton by reason — fire.* Defendant says that in said bills of lading it was specially agreed and stipulated, as more fully appears, upon the face of the same, that in accepting the bills of lading the shipper or agent of the owner of the property carried or to be carried expressly accepted and agreed to all its stipulations, exceptions and con-

ditions, none of which should be deemed to be rendered void by any custom of ports. *Said bills of lading and stipulations and conditions aforesaid, were made out by said A. Fulton & Co., with all the stipulations and conditions aforesaid and therein shown, and presented by said A. Fulton & Co., to defendant for the signature of its agent, the same were signed by said agent and were duly delivered to said A. Fulton & Co., and by them for a full and valuable consideration accepted, and they agreed* to all the terms and conditions thereof and took the same subject to such terms and conditions, and said bills of lading with such terms and conditions attached thereto, have passed into the hands of plaintiffs and they are subjected and bound by the same; and defendant says that without fault or negligence upon its part said cottons were while at the compress at Greenville as aforesaid destroyed by fire.

Third. Defendant says, that if plaintiffs are at all entitled to recover from it that then they could recover only the damages actually suffered by them; that at the time said cottons were destroyed by fire as aforesaid plaintiffs had the same insured for their full value in fire insurance companies, and that from said companies they received the full value of said cotton.

Fourth. In said bills of lading it was fully agreed that the amount of loss or damage in case of loss or damage to the same should be computed at the value or cost of said property at the time and place of shipment under said bills; that the place of shipment of said cotton was Greenville, Texas, and that the cost and value of the same at said place was dollars.

Wherefore plaintiffs could recover nothing more than this if they could recover in any event.

Fourth. If defendant is mistaken in its foregoing pleas, then defendant says that it is true that it did receive for plaintiff, for shipment, as by plaintiff alleged, the cotton by plaintiff named; that said cotton was delivered to defendant for such shipment at Greenville, Texas and that said defendant delivered to plaintiffs its two certain bills of lading aforesaid for said cotton; that said bills of lading were made out by A. Fulton & Co., with all the terms and stipulations therein shown, and were brought by said A. Fulton & Co., to defendant's agent for signature, and that defendant did execute said bills of lading and did deliver them to said A. Fulton & Co. with the terms and stipulations therein shown to which said A. Fulton fully agreed; that, among other things, it was specially stipulated and agreed in said bills of lading, as therein more fully appears, *that defendant should not be liable for loss or damage by fire while said cotton was in transit or depots, and it was further stipulated in said bills that in accepting the same the shipper or agent of the owner of the property carried expressly accepted and agreed to all its exceptions and conditions.*

Defendant says that after said cotton had been delivered as aforesaid, and the bills of lading issued therefor, and after the transit had commenced, and while said cotton was in transit, the same, without fault or negligence on the part of the defendant, was destroyed by fire.

Defendant further pleads that the shipment was a foreign shipment from a point within the State of Texas, in the United States of America, through the port of Galveston and over the high seas to Liverpool, in England, in the Kingdom of Great Britain, and defendant is a corporation duly incorporated under the laws of the State of Missouri; that its line of railway now does not and at the time of said shipment did not lie wholly within the State of Texas, but partly within it and partly without it, and

that said shipment was not to be wholly within the State of Texas, but was to be partly within said State of Texas, through said port aforesaid, and over the high seas aforesaid on said bills of lading above shown.

Defendant prays that plaintiffs take nothing by their suit, and that defendant go hence and recover of plaintiffs all cost.

And thereafter on the same day the defendants in error filed their first supplemental petition and exceptions in answer to defendant's special amended original answer in the words and figures following:—

IN U. S. CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLIS.

Geo. H. McFadden & Bro.

vs.

Missouri Pacific Railway Company.

Now come the plaintiffs by leave of the court and file this their first supplemental petition in answer to defendant's special amended original answer filed herein on June 2nd, 1890, and except to said answer and say that the same is insufficient in law, and of this they pray judgment.

And they specially except to the first count in defendant's special answer in so far as the same attempts to set up a custom of the manner of receiving cotton and issuing bills of lading, because the same does not show that the custom was such as is recognized and binding in law, but

attempts to set up a custom which is contrary to law, and because the same does not show that it was such a custom as would relieve the defendant from liability on a contract in writing.

They specially except to the second and fourth counts in said special answer in so far as the same attempts to set up a contract to excuse the defendant from any liability by reason of damage by fire or other causualty, because said plea shows that the said contract was entered into in the city of Greenville, in the State of Texas, and was therefore governed and controlled by the laws of the State of Texas which prohibits the execution of such contracts as the one set forth by defendant.

Plaintiffs specially except to that part of said answer which attempts to set up an agreement to be bound by the custom of ports, because the same is not shown to be material or relevant to this cause.

Plaintiffs except to that part of said answer which sets up that the plaintiffs had the cotton in controversy insured for its full value, because the same is immaterial and irrelevant to the controversy herein, and constitutes no defense in law to the plaintiffs' cause of action.

And, answering said special plea, plaintiffs deny all the allegations therein contained except those which admit the issuance and assignments of the bills of lading and the destruction of said cotton by fire, and of this they put themselves upon the country.

For special answer plaintiffs say that the cotton was delivered by Fulton & Co. to the defendant, and the bill of lading was issued by the defendant and assigned to those plaintiffs without notice on their part of any custom or agreement by which the liability of the defendant had not attached, and they say that in truth and in fact the cotton had been received by the defendant as a common carrier, and was put in its custody and it became liable under the

contract of shipment and the law for the proper and safe handling and care of the same.

And plaintiffs further say that the defendant was not permitted, under its contract of carriage, to stop said cotton for the purpose of having the same compressed.

And, further replying to defendant's said answer, the plaintiffs say that defendant was accustomed to receive all cotton for shipment at Greenville, upon a platform in said city controlled by the compress association, under an agreement between it and said association, the terms and details of which are not known to plaintiff; and that all cotton for shipment at said point was required by defendant, and compelled to be delivered upon the same; that the defendant, at and about the time the plaintiff's cotton was received for shipment and bill of lading therefor delivered, had stored other and large quantities of cotton on said platform and continued to store the same there, which said platform was adjacent to several tracks accustomed to be used by defendant, and which were built for the purpose of approaching said platform with cars of cotton to be loaded and unloaded, etc.; that the defendant, although warned of the danger thereof on account of fire, caused great quantities of cotton to be accumulated upon said platform, to wit, about three thousand bales, and permitted the same to be accumulated, instead of carrying it off, as it was obliged to do in performance of its duty as common carrier, and as ordinary care and caution required it to do. The defendant, instead of pushing its cars in and alongside of said platform while said cotton, which was highly inflammable, was exposed near its said tracks, was accustomed to run engines in and near the same, which said engines were out of repair and which, whether in or out of repair, would necessarily have emitted sparks and coals of fire, which would easily ignite said cotton if they came in contact therewith; that defendant was also ac-

customed to unload cotton alongside of said tracks, and permit its engines to pass the same emitting sparks and coals of fire as aforesaid; that on, to wit, the 14th day of November, 1887, while the cotton of plaintiff was so exposed as aforesaid, the defendant carelessly and negligently ran an engine or engines alongside said tracks adjacent to said cotton, which by reason of sparks and coals of fire emitted therefrom, ignited the same and caused the same to be communicated to the cotton of plaintiff, which was there upon the platform, or in the cars of defendant adjacent thereto, where it ought to have been for the purpose of being transported, and the plaintiffs say that the accumulation of said cotton in such large quantities and the running of engines at all near the same, which, no matter what the condition of said engines might be with respect to devices, etc., for the prevention of the escape of sparks and coals therefrom, could not be prevented from emitting the same, was an act of negligence, and which said acts of negligence, combined, caused the said cotton to be burned and utterly destroyed. And all this plaintiffs are ready to verify, and pray judgment as in their original petition.

And on the same day the court sustained each and every demurrer and exception contained in said supplemental petition, to which action the plaintiff in error at the time duly excepted.

The case was tried before the court, the parties having signed a stipulation waiving a jury, and agreeing to submit matters of fact as well as of law to trial by the court. At

trial before the court, the parties submitted to the court the following agreement as to evidence: —

IN U. S. CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT DALLAS.

Geo. H. McFadden & Bro.

vs.

Missouri Pacific Railway Co.

Upon the trial of this cause the following facts were introduced: —

Plaintiffs offered in evidence the bills of lading, copies of which were attached to defendant's answer. It was admitted that said bills had been assigned by A. Fulton & Co. to plaintiffs.

It was agreed that the cotton in controversy was the property of Geo. H. McFadden & Bro., and that it was destroyed by fire at Greenville, Texas, on the 14th day of November, 1887, subsequent to the time of the execution of the bills of lading.

It was further agreed that said cotton was of the value of $8,647.83 at Greenville, Texas, at the time it was destroyed.

It is further agreed that defendant never paid plaintiffs for said cotton or any part thereof.

The above was all the evidence introduced on the trial of this cause.

PERKINS, GILBERT & PERKINS,
LEAKE, SHEPARD & MILLER,
Att'ys for Plaintiffs.
F. C. DILLARD,
Att'y for Defendant.

And on June 4th, 1890, A. P. McCormick, judge of said court, made the following findings of fact and conclusions of law thereon: —

In U. S. Circuit Court for the Northern District of Texas, at Dallas.

Geo. H. McFadden & Bro.
vs.
Mo. Pac. Ry. Co.

The court approves the agreement as to evidence introduced made by the attorneys in this cause and above shown and finds the facts therefrom as follows:—

1. Defendant executed and delivered to A. Fulton & Co. the bills of lading by plaintiffs declared upon and which are fully shown as "Exhibit A" and "Exhibit B" to defendant's first amended original answer. Said bills of lading were duly assigned by A. Fulton & Co. to plaintiffs.

2. The cotton named in said bills of lading was destroyed by fire on the 14th day of November, 1887, at Greenville, Texas, subsequent to the date of the execution and delivery of said bills of lading to A. Fulton & Co. Said cotton was then the property of Geo. H. McFadden & Bro., and was then and there of the value of $8,647.83. Defendants have never paid plaintiffs for said cotton or any part thereof.

From these facts the court concludes:—

1. The bills of lading being executed and delivered in the State of Texas for a shipment originating within said

State, must be construed in accordance with the statute law of said State, and be held to have intended to be governed by such law. In accordance with said law all stipulation in said bill releasing defendant from loss or damage by reason of fire is absolutely void.

After the signing of said bills by defendant, its duty and liability as a common carrier commenced, and after such time it would be responsible for any loss or damage save such as it could excuse itself from at common law irrespective of contract.

2. Plaintiff will have judgment against defendant for $8,647.83 with interest from November 14th, 1887, at the rate of 8 per cent per annum.

A. P. McCormick, Judge.

And thereupon the court rendered judgment in favor of defendants in error against plaintiff in error for the sum of $10,415.80 with interest from date (record, page 24).

To which judgment of the court plaintiff in error excepted for that upon the facts found judgment should have been for it instead of the defendants in error, and brings the case here for review by this honorable court upon the following assignments of error:—

ASSIGNMENTS OF ERROR.

1. The court erred in sustaining the general exceptions and the special exceptions to the first count in defendant's first amended original answer, for the matters in said count were well and sufficiently pleaded and constituted a good defense to plaintiff's cause of action, because although the bills of lading were signed

and delivered, yet when this was done for the convenience of the shipper before the actual delivery of the cotton to the railway and with the understanding that the liability of the defendant as a carrier under the bill of lading should not attach until the actual delivery of the cotton to it, then would defendant not be liable prior to the time of such delivery for any injury befalling the cotton.

2. The court further erred in sustaining said exceptions to the first count, because said count alleged that said cotton while at the compress was under the control of said A. Fulton & Company or their agent, and was placed there by said A. Fulton and Company to be compressed before shipment, and if this were true defendant would not be liable for its destruction.

3. The court erred in sustaining the general exception and special exceptions to the second and fourth counts in defendant's said answer, because the matters alleged in said count were well and sufficiently pleaded and constituted a good defense to plaintiffs' cause of action. The shipment was a shipment from a point within the State of Texas through the port of Galveston over the high seas to Liverpool, England, and the stipulation in the bill of lading that defendant should not be responsible for loss caused by fire was a good, valid, and binding contract, and, the loss occurring by fire, defendant was not liable for such loss while said cotton was in place of deposit or transit or even after the carriage had commenced.

4. The court erred in his conclusion of law and in giving judgment for plaintiff, because from the facts found by him judgment should not have been for plaintiffs, but for defendant, and especially from said facts found by the court should judgment have been for defendant, because it

appeared from the bill of lading, which the court found to have been duly executed, that the shipment was a shipment from Greenville, Texas, to Liverpool, England, and that said cotton was destroyed by fire, and under the terms of said bill of lading the defendant was not liable for its destruction from such cause.

5. The court erred in his first conclusion of law in holding that the statute law of Texas would govern the shipment, for the shipment being a foreign shipment from Greenville, Texas, to Liverpool, England, the parties might make a valid contract as to relieving the defendant from liability, and the statute laws of Texas would in no way apply to it.

6. The court erred in holding that the statute law of Texas could in any event have any effect upon this shipment, because said law professes to apply only to a carriage wholly within the State of Texas, said law being as follows:

"Railroad companies and other common carriers of goods, wares and merchandise for hire within this State on land, or in boats or on vessels on the waters entirely within the body of this State shall not limit or restrict their liability as it exists at common law by any general or special notice, or by inserting exceptions in a bill of lading or memorandum given upon receipt of goods for transportation or in any manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid." (Revised Statute Texas, Article 2781.)

Under the facts found by the court, the court erred in not rendering judgment for defendant, because it appears therefrom that the cotton was destroyed by fire, and the defendant, by a good and valid contract, was not liable for any destruction caused in this way.

QUESTIONS IN THE CASE.

The questions presented for the consideration of this court are:—

1st. Had any liability as a common carrier attached to the defendant company at the time of the destruction of the cotton by fire?

2d. There being no evidence in the cause or findings by the court that the fire resulted from negligence of the company, is the company by reason of the Texas statute liable notwithstanding the express agreements in the bills of ladings exempting it from liability for losses by fire.

3d. Does the Texas statute apply to Inter State or foreign shipments?

POINTS AND AUTHORITIES.

FIRST AND SECOND ASSIGNED ERRORS.

The first and second assignments of errors are to the action of the court in sustaining exceptions and demurrers to first count of plaintiff in error's special answer, and may properly be considered together.

Plaintiff in error in the first count of its special answer, while admitting the issuance of the two bills of lading sued upon, denied that the cotton covered thereby had indeed or in truth been delivered to it, but alleged that the same had been delivered to a compress company in Greenville to be compressed for the shipper, and at the time of its destruction by fire was still in the possession of the compress company, and undelivered to the railway company, and that according to custom, and for the convenience of shipper, the railway company had signed the two bills of lading sued upon, which were made out by the shippers, in advance of receiving the cotton from the compress, in accordance with the custom well known to the shipper and defendants in error, and for their convenience as aforesaid.

A COMMON CARRIER IS NOT LIABLE (a) FOR THE LOSS OF GOODS NOT ACTUALLY RECEIVED BY IT THOUGH BILLS OF LADING HAVE BEEN ISSUED THEREFOR, NOR (b) IS IT LIABLE AS A COMMON CARRIER FOR GOODS ACTUALLY RECEIVED, BUT HELD AWAITING FURTHER ORDERS OF THE SHIPPER OR THE DOING OF SOMETHING WITH THE GOODS, BY THE SHIPPER OR FOR HIS ACCOUNT OR BENEFIT, BEFORE SHIPMENT.

(a) St. L. I. M. & S. R. R. Co. *v.* Knight, 122 U. S. 79;

Schooner Freeman *v.* Buchanan, 18 Howard, 182;
Friedlander *v.* T. & P. Ry. Co., 130 U. S. 416;
Pollard *v.* Vinton, 105 U. S. 7;
8th Railway and Corporation Law Journal, 249;
The Lady Franklin, 8th Wallace, 325;

(b) St. L. I. M. & S. Ry. Co. *v.* Knight, supra;
Watts *v.* Boston &c R. R. Co., 106 Mass. 466;
St. Louis &c Ry. Co. *v.* Montgomery, 39 Ill. 335;
Finn *v.* Western Railway, 102 Mass. 283;
Cairs *v.* Robbins, 8th M. & W. 258;
Schouler on Bailments, Sec. 390;
Hutchinson on Carriers (2nd Ed.), Sec. 88;
Art. 281, Sayles Texas Civil Statutes.

THIRD, FOURTH, FIFTH AND SIXTH ASSIGNED ERRORS.

We consider these errors together because they all go to the action of the court below in holding the clause in the bills of lading, releasing the railway company from loss or damage by reason of fire, absolutely void by reason of the bills of lading having been executed and delivered in the State of Texas for a shipment originating within said State, and because of the following statute law of the State of Texas:—

"Railroad companies and other common carriers of goods, wares and merchandise for hire within this State, on land or in boats or vessels on the waters, entirely within the boundary of this State, shall not limit or restrict their liability as it exists at common law by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation or in any other manner whatever, and no special

agreement made in contraversion of the foregoing provision of this article shall be valid."

(Act. Dec. 4th, 1863,) Art. 278, Sayles' Texas Civil Statutes.

In so holding, the court below erred because (and granting that the railway had received the cotton for immediate shipment):—

1. It was a foreign or interstate shipment.

Wabash Ry. Co. *v.* Ill., 118 U. S. 557;
Louisville & N. R. Co. *v.* R. R. Commission, 19 Fed. Rep. 679;
Secs. 1 and 7 Interstate Commerce Act.

2. It was a foreign or interstate shipment notwithstanding the fact that the Railway Company limited its liability to its own road, and the further fact that its road over which the shipment moved was wholly within the State of Texas.

Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co., 129 U. S. 401;
Railroad Company *v.* Androscoggin Mills, 22 Wal. 594;
Sherwood *v.* Mo. Pac. Ry. Co., 19 S. W. 455;
Railroad Co. *v.* Pratt, 22 Wal. 225;
Texas & Pac. Ry. Co. *v.* Clark, 23 S. W. 698;
Porter on Bills of Lading, Sections 323, 324, 326 and 331.

3. The Texas statute prohibiting common carriers from limiting their common law liability does not apply to foreign or interstate shipments.

Sherwood et al. *v.* Mo. Pac. Ry. Co., 19 S. W. Rep. (Sup. Ct. of Texas, decided in 1892), 455.

4. The clause in the bills of lading exempting the carrier from loss by fire was reasonable and valid.

Railway Co. *v.* Harris, 67 Tex. 166;
New York Co. *v.* Central R. R., 3 Wallace, 107;
Express Co. *v.* Caldwell, 21 Wallace, 264;
Hart *v.* Railway Co., 112 U. S. 331;
Sherwood *v.* Mo. Pac. Ry. Co., 19 S. W. 455;
Railway *v.* Androscoggin, 22 Wallace, 594;
N. J. Steam Navigation Co. *v.* Bank, 6 Howard, 344;
Express Co *v.* Kountze, 8 Wallace, 343;
L. & N. Ry. Co. *v.* Manchester Mills, 14 S. W. 314;
T. & P. Ry. Co. *v.* Davis, 2d Texas Civil Cases;
Arnold *v.* Jones, 26 Texas, 336.

5. It is alleged in the answer of plaintiff in error that if the cotton was destroyed, it was destroyed by fire at Greenville, Tex., without fault or negligence on its part, while in the compress at Greenville, in nowise owned or operated by defendant. Fire occurring under such circumstances, in view of the exemption clause in the bill of lading pleaded by plaintiff in error, is not to be ascribed to the negligence of the carrier.

Lancaster Mills *v.* Merchants &c. Co., supra.

6. There is no evidence or finding that the cotton was destroyed through the negligence of plaintiff in error, and under the terms of the bills of lading exempting the carrier

from loss by fire, the burden of showing negligence was upon the defendants in error.

N. J. Steam Navigation Co. *v.* Bank, 6 Howard, 344;
Transportation Co. *v.* Downer, 11 Wallace, 129;
Clark *v.* Barnwell, 12 Howard, 272;
Witting *v.* St. Louis &c., Ry. Co., 101 Mo. 632;
Wertheimer *v.* Penna. R. R. Co., 17 Blatchf. 421;
Hall *v.* Penna. R. R. Co., 14 Phila. 414;
Cochran *v.* Dinsmore, 49 N. Y. 249;
Farnham *v.* Camden &c., R. R. Co. 55 Pa. St. 53;
Sherman *v.* Penna. R. R. Co., 8 W. N. C. 269;
Colton *v.* Cleveland &c. R. R. Co., 67 Pa. St. 211;
Little Rock &c. R. R. Co. *v.* Corcoran, 40 Ark. 375;
Taylor *v.* Little Rock &c. R. R. Co., 39 Ib. 148;
Little Bock &c. R. R. Co. *v.* Talbot, Ib. 523;
Denton *v.* C. R. I. & P. R. R. Co., 52 Ia. 161;
Sandy *v.* C. & N. W. R. R. Co., 30 Ia. 420;
Union Steamboat Co. *v.* Knapp, 73 Ill. 506;
The "Emily" *v.* Carney, 5 Kansas, 645;
Frank *v.* Adams Express Co., 18 La. Ann. Rep. 279;
Harris *v.* Packwood, 3 Taunt. 264;
Marsh *v.* Horn, 5 Barn. & Cress. 322;
The Adriatic, 16 Blatch. 424;
The Saratoga, 20 Fed. Rep. 869;
Marx *v.* The Britannia, 34 Fed. Rep. 906;
The Barraconta, 39 Id. 288;
The New Orleans, 26 Id. 44;
French *v.* B. & E. R. R., 2 Abb. Ct. Ap. 196;
Lamb *v.* C. & A. R. R. & T. Co., 46 N. Y. 271;
Kallman *v.* U. S. Exp. Co., 3 Kans. 205;
K. P. Ry. *v.* Reynolds, 8 Id. 623;
Sager *v.* P. S. & P. & E. Ry., 31 Me. 228;
Price *v.* The Ship Uriel, 10 La. An. 413.

7. It cannot be presumed that the cotton was burnt through negligence of carrier.

M. & C. R. R. *v.* Reeves, 10 Wal. 179;
N. J. Stm. Nav. Co. *v.* Bank, 6 How. 344;
Schmidt *v.* Blood, 9 Wend. 268;
Sherman *v.* West. Trans. Co., 62 Barb. 150;
Gaudg *v.* C. & N. Ry., 30 Ia. 421;
Laing *v.* Colder, 8 Penn. St. 479;
Bankard *v.* B. & C. Ry., 34 Md. 197.

ARGUMENT.

I.

The plaintiffs below, defendants in error here, could only recover for the cotton in question, which was destroyed by fire while in the compress at Greenville, by showing, not only that the bills of lading had been signed and delivered prior to the time of the fire, but that prior to that time the railway had actually taken possession of the cotton as a common carrier for immediate transportation. It was entirely competent for the railway company to show, notwithstanding the receipt clauses of the bills of lading that it had not in fact received the cotton at the time of the fire. This is conclusively determined by authorities cited under first and second assigned errors, Points and Authorities, pages 22 and 23. The learned judge who tried this case below could not have had his attention called to these authorities or else overlooked them in sustaining the exceptions to first count of special answer of the railway company, wherein it set up the defense that it had not, at the time of the fire, actually received the cotton for transportation.

II.

The learned judge of the court below misconstrued the Texas statute, hereinbefore set out, prohibiting common carriers from limiting their liability as fixed by common law, as applying to interstate or foreign shipments. At the time this case was tried the Supreme Court of Texas

had not construed this statute. Since that time, however, the Supreme Court of Texas have construed it as not applying to interstate or foreign shipments, and under familiar rules of law such construction of the statute, by the highest court of the State, will be followed by this court. A reading of this statute clearly shows that the construction and interpretation placed on it by the Texas court is correct, and if the question were presented to this court for the first time, it would undoubtedly construe the statute as not applying to interstate or foreign shipments. If the statute should be construed as applying to interstate or foreign shipments we should then contend that it was void as to interstate or foreign shipments. The decision of the Supreme Court of Texas (Sherwood *v.* Railroad Co., *supra*) was rendered upon a bill of lading in same form as those sued on in the case at bar, for cotton delivered to this defendant railway company at Greenville, Texas, for shipment to Liverpool, England, and was destroyed by the same fire as the cotton in this case.

The rules of law applicable to this case are perfectly familiar. Although at common law a carrier was responsible for losses unless caused by the act of God or a public enemy, yet the right of the carrier to limit its liability, as fixed by common law, except as against its own negligence, by special contract, has universally been recognized by the courts.

The application of these rules to this case determines the validity of the clauses in the bills of lading in question which specially exempt the railway company from liability for loss by fire,—there being no showing that such loss was occasioned through the negligence of the company. The judge who tried the case below was undoubtedly familiar with these rules, but failed to apply them on the ground that the statute of Texas, prohibiting the limitation of liability of carriers, applied to the bills of lading in ques-

tion. This holding, we contend, this court must pronounce erroneous.

For the convenience of the court we append the material part of the opinion of the Supreme Court of Texas in Sherwood *v.* Railway, *supra*. This opinion, if followed by this court, is conclusive of the case now under review.

We respectfully ask that the case be reversed, with instructions to the court below to enter judgment for the plaintiff in error.

JAMES HAGERMAN,
JOSEPH M. BRYSON,
Attorneys for Plaintiff in Erorr.

OPINION OF SUPREME COURT OF TEXAS IN SHERWOOD VS. RAILWAY.

The first question to be considered is, did the court err in sustaining the special exception addressed by plaintiffs to defendant's answer? The defendant seeks to shield itself under the stipulation that it should not be liable for loss by fire while in transit, or while on deposit in place of transshipment or depots or landings, or at points of delivery. By such loss we understand a loss due to fire which is not directly traceable to the negligence of the carrier or his servant. Porter's Law of Bill of Lading, § 223, pp. 161, 162, note 1. It is alleged in the defendant's answer that, if the cotton was destroyed, it was destroyed by fire at Greenville, Tex., without fault or negligence of defendant or its servants, while in transit while in the Greenville Compress, in no wise owned or operated by defendant, while waiting to be compressed as provided by the bills of lading. Fire occurring under such circumstances, in view of the exemption clause in the bill of lading pleaded by defendant, is not to be ascribed to the negligence of the carrier. Lancaster Mills *v.* Merchant's, etc., Co. (Tenn.), 14 S. W. Rep. 317. That a common carrier may, unless forbidden by statute, so contract as to exempt itself from liability for loss by fire, unless caused by the negligence of itself or its servants, is well settled. Such a limitation is reasonable. Railway Co. *v.* Harris, 67 Tex. 166; 2 S. W. Rep. 574; York Co. *v.* Central Railroad, 3 Wall. 107; Express Co. *v.* Caldwell, 21 Wall. 264; Hart *v.* Railway Co., 112 U. S. 338; 5 Sup. Ct. Rep. 151. Appellees, however, claim that the restric-

tion here pleaded is forbidden by our statute (article 278, Rev. St.), which reads as follows: "Railroad companies and other common carriers of goods, wares, and merchandise for hire, within this State, on land, or in boats or vessels on the waters entirely within the body of this State, shall not limit or restrict their liability, as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever; and no special agreement made in contravention of the foregoing provisions of this article shall be valid." Appellant holds that appellees cannot invoke the provisions of this statute, because (1) the shipment here involved is not a domestic, but is a foreign or an interstate, shipment; (2) the statute applies only to domestic shipments; (3) if the statute be intended to apply to foreign shipments, and to annul a contract of foreign shipment exempting a carrier from liability for loss by fire not chargeable to its negligence, the statute is a regulation of interstate commerce, and as to such regulation is void.

1. Is the contract of shipment set out in the petition of appellees a contract of domestic or a contract of foreign or interstate shipment? By a contract of domestic shipment is understood such a contract as contemplates the shipment of goods from one point in a State to another point therein. By a contract of foreign or interstate shipment is understood such a contract as contemplates the transportation thereunder of goods from a point within a State to a foreign country, or to a point within another State. Transportation is only domestic when confined to the boundaries of the State in which the contract of shipment is entered into. Wabash, etc., Ry. Co. *v.* Illinois, 118 U. S. 557; 7 Sup. Ct. Rep. 4; Louisville & N. R. Co. *v.* Railroad Commission of Tennessee, 19 Fed. Rep. 679. Applying these

definitions to the contract set out in plaintiffs' petition, the conclusion is inevitable that the shipment there described is a foreign shipment. The petition alleges an undertaking on the part of the carrier, defendant, to carry the cotton upon its lines, and to deliver it to its connecting lines, to be carried to the city of New Orleans, La., there to be delivered to the West India Pacific Steamship Company, to be transported to Liverpool, and there delivered to Martin, Wise & Fitzhugh, or their assigns.

2. Does the statute referred to apply to an interstate or foreign shipment? This question has been several times suggested to our Supreme Court, but the disposition of the cases in which it was presented did not require a solution of it. Ryan *v.* Railway Co., 65 Tex. 13; Railway Co. *v.* Harris, 67 Tex. 166, 2 S. W. Rep. 574; Missouri Pac. Ry. Co. *v.* China Manuf'g Co., 79 Tex. 26; 14 S. W. Rep. 785. We are of opinion that the question must be answered in the negative; that the statute applies to shipments purely domestic, beginning and ending in the State of Texas. Our conclusion is founded upon the language of the statute itself. "Railroad companies and other common carriers * * * within this State, on land, or in boats or vessels on the waters entirely within the body of this State, shall not limit or restrict their liability; as it exists at common law." Railroads and other common carriers within this State, on land, are put, as to transportation, upon the same plane, so to speak, as boats or vessels on the waters entirely within the body of this State. As to transportation within the State, they are forbidden to limit their liability as it exists at common law. The limitation prescribed by the statute, if it be more extended as to railroads than to boats or vessels, is so only in the sense that, as to the former, it is not confined to carriers operating exclusively within the State, while, as to the latter, it is

restricted to carriers plying on waters wholly within the State. The track of a railroad company may extend beyond the limits of the State; yet, if goods be carried by it from one point to another within this State, such carriage constitutes transportation within this State, and such railroad is a "carrier within this State." But if the railroad, whether by itself or by its connecting lines, its agents, transports goods from a point within this State to a point in another State, it is a carrier, not "within this State," but within and out of this State into another. In the latter event, it is engaged in interstate commerce. With reference to its domestic character, we do not think that any discrimination was intended by the legislature between a shipment by water and by rail. The scope of the limitation is logically the same whether applied to the carrier as a railroad or as a steamboat. Transportation "within this State" is, in either case, the subject-matter of the legislation. Our legislature seems to have had in mind, in the adoption of the statute, article 1, § 8, of the Federal constitution, investing Congress with the power to regulate commerce among the States.

3. Having concluded that article 278 applies only to domestic shipments, and that the shipment described in the plaintiffs' petition is not a domestic shipment, it becomes unnecessary to discuss, and we consequently refrain from considering, the third question presented by appellant, viz., the validity or invalidity of this statute as a regulation of interstate or foreign commerce, provided it was intended to apply to such commerce. Appellees seem to contend that, without reference to the action of the court on their demurrer, the judgment is nevertheless proper, because the bill of lading, though nominally a through bill of lading, is, so far as the Missouri Pacific Railway Company is concerned, in reality domestic; that it is a domestic bill,

"because, as they contend, by its terms the liability of the railway company is limited to its own line, and ends with the delivery of the cotton to the steamship company at Galveston, within the limits of the State of Texas, where its bill of lading was to be taken up, and another given by the steamship company, whose liability then attached." The bill of lading described in plaintiffs' original petition provides for a transportation of the cotton from Greenville, Tex., by the Missouri Pacific Railway Company, and its connecting lines, through Louisiana to New Orleans, and thence to Liverpool. It is silent as to a limitation by the company of its liability to its own line. The bill of lading described in the plaintiffs' supplemental petition (in which it is alleged that the defendant's railway was at the time wholly within the State of Texas) provides "that the liability of the defendant is limited to its own line of railway." The bill introduced in evidence purports on its face to be a foreign bill of lading. It provides for the transportation by the Missouri Pacific Railway Company of the cotton at the rate of $1.36 per 100 pounds from Greenville, Tex., to Liverpool, England. It provides that the liability of the company is limited to its own line of railway, and is to cease on the delivery of the goods to the steamship company or their agent at Galveston, when the liability of the steamship company commences, and not before. The bill is signed for the railway company by A. L. Downer, who signs as agent, severally but not jointly, for the railway and steamship companies. It will be seen that the bill of lading introduced in evidence differs from that described in the original petition, though it is perhaps supported by the averments of the supplemental petition. Does the provision limiting the liability of the company to its own line, terminating at Galveston, so affect the character of the instrument as to make of it a domestic bill of lading? We think not. The instrument on its face

purports to be a foreign bill of lading. It constitutes, as we view it, an undertaking on the part of the carrier, defendant, to transport and have transported from Greenville, Tex., to Liverpool, England, the cotton in question. It provides for a rate of freight between these points of $1.36 per 100 pounds. It contemplates a continuous transportation from Greenville, Tex., to Liverpool, England. These are all features of a "through" contract of shipment. Port. Bill Lad., §§ 323, 324, 326, 331. In Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co., 129 U. S. 401, 9 Sup. Ct. Rep. 469, a bill of lading providing for a shipment from Nashville, Tenn., to Liverpool, England, and limiting the liability of the connecting carriers to their own lines, was treated by the Supreme Court of the United States as a through shipment. The stipulation referred to was intended, we think, solely to qualify the responsibility of the carrier, without affecting the character of the shipment as a through shipment. We cannot regard the bill of lading in question as a mere receipt by the carrier of goods marked for a destination beyond the terminus of its route. It is more. It is a contract of shipment, and an undertaking to transport from Texas to a foreign country. Our attention is called by appellees, in support of their proposition already stated, to the case of Heiserman *v.* Railway Co., 63 Iowa, 732; 18 N. W. Rep. 903. In that case, while it was true that goods shipped at West Union, Iowa, were destined for Milwaukee, Wis., the contract of the carrier was to transport them from West Union to Postville, Iowa, and no further. The goods, under the contract with the carrier, were to be transported and delivered at Postville, where the freight for such transportation was to be paid to the carrier. This was plainly a domestic shipment; the carrier not having contracted to carry the goods, or to have them carried to Milwaukee.

No. 318. October Term, 1893.

IN THE

Supreme Court of the United States.

The Missouri Pacific Railway Company, Plaintiff in Error,

vs.

George H. McFadden, John H. McFadden, Franklin McFadden, composing the firm of George H. McFadden & Bro., Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF DEFENDANTS IN ERROR.

GEORGE WHARTON PEPPER,
J. BAYARD HENRY,
Of Counsel.

Allen, Lane & Scott, Prs., Phila.

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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COUNTER-STATEMENT.

From the evidence offered by agreement in the court below, from the findings of fact by the learned court, and from the admissions contained in the pleadings of both parties, the following facts appear:—

I. The defendant executed and delivered to A. Fulton & Co. the bills of lading declared upon by the plaintiffs, and these bills of lading were duly assigned by A. Fulton & Co. to the plaintiffs. (Finding of facts, 1 R., 23.)

II. Subsequently to the execution and delivery of the bills of lading the cotton in question was at a certain compress near the depot of the defendant, which said compress was the property of, or was under the control of, a compress company. (Defendant's amended original answer, R., 19.)

III. The cotton while still at compress at Greenville, and subsequently to the date of the execution and delivery of the bills of lading as aforesaid, was destroyed by fire. (Findings of fact, 2 R., 23; defendant's first amended original answer, R., 19.)

IV. The said cotton at the time of its destruction was the property of the plaintiffs George H. McFadden & Bro. (Findings of fact, 2 R., 23.)

V. The bills of lading in question are entitled upon their face: "Foreign bill lading No. F, 46, contract No. 250," and "Foreign bill lading No. F, 55, contract No. 250," respectively. They are bills of lading which contemplate a carriage by rail from Greenville in Texas to Galveston in Texas, over a line of track wholly within the State of Texas, and a transportation by sea from Galveston to Liverpool, England, by the steamship Mallory and Cunard, with liberty to ship by any other steamship or steamship company, &c. They are both signed by one Downer, who signs as agent "severally but not jointly" of the successive carriers. (Exhibits A and B to defendant's first amended original answer, R., 10–16.)

VI. Both bills of lading contained the following clause: "The liability of the Missouri Pacific Railway Company is hereby limited to its own lines of railway, and is to cease upon delivery to the next succeeding carrier of the articles specified herein." Also the following clause: "It is further stipulated and agreed that in case of any loss, detriment, or damage to, or sustained by, any of the property herein receipted for during such transportation whereby any legal liability or responsibility shall or may occur, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage." Also the following clause: "It is further agreed that the said Missori Pacific Railway Company have liberty to forward the goods or property to port of destination by any other steamship or steamship company than that named hereon; and this contract is executed and accomplished, and the liability

of the Missouri Pacific Railway Company as common carriers thereunder terminates on the delivery of the goods or property to the steamship or steamship company, or their agents at Galveston, when the responsibility of the steamship or steamship company commences, and not before. (Exhibits A and B to defendant's first amended original answer, R., 23.)

QUESTIONS IN THE CASE.

Upon the facts as above set forth the following questions arise for the consideration of this court:—

I. *Had the liability of the defendant company as a common carrier attached at the time of the destruction of the cotton by fire?*

II. *If the liability of the defendant company, as a common carrier, had attached at the time of the fire, had the exemption contained in the bill of lading also attached at that time?*

III. *If the liability and the exemption had attached, and assuming that the exemption was valid under the law of Texas, does it appear that the exemption was broad enough to cover the loss of the cotton in this case?*

IV. *Is that portion of the bill of lading which constitutes a contract between the plaintiffs and the defendant in its capacity as a common carrier governed by the law of Texas?*

V. *If the contract of carriage is governed by the law of Texas, is it within the terms of Article 2781 of the Revised Statutes of Texas?*

VI. *If the contract of carriage is within the terms of the Texas statute, is that statute valid as a regulation of the contract, or invalid as a regulation of interstate commerce?*

It is proposed to examine these questions in the order stated.

ARGUMENT.

I.

THE LIABILITY OF THE DEFENDANT AS CARRIER ATTACHED UPON THE EXECUTION AND DELIVERY OF THE BILLS OF LADING, AND PRIOR TO THE DESTRUCTION OF THE COTTON BY FIRE.

Upon this point the finding of the learned judge in the court below was as follows:—

"After the signing of said bills by the defendant, its duty and liability as a common carrier commenced."

In the case before the Supreme Court of Texas, which grew out of much the same facts as those upon which this case depends (M. P. Ry. Co. *vs.* Sherwood, 19 S. W. Rep., 455, 1892), the defendant company does not appear to have thought it worth while to contend that its liability as carrier had not attached at the time of the fire. The State court, following the decision of Judge McCormick, seems to have considered it too clear for argument that when the shipper had parted with all control and custody of the goods, and the carrier, by its bill of lading, had acknowledged the receipt of them, the liability of the carrier, whether limited or unlimited, attached *eo instanti*.

Now, however, the learned counsel for the plaintiff in error strenuously contend that the liability of the carrier had not accrued at the time of the fire, and they cite in support of the proposition several decisions, which, upon examination, are found (it is submitted) to have no bearing upon the case in hand.

Considering the case first upon principle, it will, of course, be admitted that the giving of the bill of lading for the goods raises a *prima facies* that the carrier has received them. Such a *prima facies* may be set aside by proof that the issuing of the bill was due to mistake, or fraud, or misrepresentation. But the delivery of the bill "is said to be very high and authentic evidence" not only of the receipt of the goods, but "of both the quantity and condition of the goods when they were received, though not an estoppel to show the truth." (Hutchinson on Carriers, second edition, section 122.)

How is it sought in this case to set the presumption aside? No error, or fraud, or mistake is even averred. The railway company places its whole reliance upon an alleged "custom" in force at Greenville, according to which all cotton to be shipped over the defendant's road was by public invitation of the defendant, deposited upon a platform controlled by a compress company, which company is admitted by the defendant to have been a party to an agreement with the carrier, according to which the carrier issued a bill of lading immediately upon receiving notice of the deposit of the cotton. It is almost preposterous to contend that there is in such a custom any feature which in any respect varies the carrier's liability. Either the custom is consistent with the unqualified acceptance of which the bill of lading is evidence, or it is a custom which, by the making of the bill, the parties have excluded by their contract.

These considerations, deduced from principle, are in nowise inconsistent with the cases cited by the plaintiff in error. For example: in Iron Mt. Ry. *vs.* Knight, 122 U. S., 79 (1886), the question was whether the recital in a bill was conclusive as to the quality of cotton shipped. The cotton had been shipped to Texarkana, to be there made up into bales at a compress-house by the carrier under the direction of the shipper, who, from time to time, selected bales of different quality for shipment, but the bills were often issued before the particular bales were separated from the mass. Obviously, therefore, the liability of the defendant as a carrier could not begin until the property which it was to carry was identified. But, more than this, the case is actually favorable to our contention, for Mr. Justice Matthews could not have used language more applicable to the present case than that which is found on page 93: "It may be said that the defendant's liability as a common carrier commenced at a time antecedent to the delivery of the cotton to be loaded on the cars; that it might have arisen upon a prior delivery of the cotton in question in the warehouse to be compressed, and then transported, the duty of compressing it, in order to prepare it for transportation, having been undertaken by the defendant. This, however,

could only be when the specific goods, as the property of the plaintiff, were delivered for that purpose into the exclusive possession and control of the defendants." It will be perceived at a glance that the condition of the carrier's liability, in conformity with the view of the learned judge, is entirely satisfied by the facts of the case in hand.

Of the remaining cases cited by the defendant, three are the cases of a fraudulent bill for goods not shipped, and two are the cases of a bill issued by mistake for goods not shipped. Of the cases which deal with the retention of control over the goods by the shipper, one is a case in which the carrier kept goods for the shipper in his freight-house waiting for the whole lot to be delivered before shipment; one is a case where the owner requested the carrier to hold the goods till he could communicate with the consignee; and one is the case of goods sent to the carrier's warehouse with directions to await the owner's orders. On referring to Schouler it is found that he merely restates these and similar cases; the whole discussion of the subject by Hutchinson makes directly in support of the plaintiff's contention; while article 281, Texas Civil Stat., refers only to carriers "having depots or warehouses for storing goods;" and a subsequent section (4237) provides that the carrier must give notice to the consignee before it can be released from its liability as carrier.

II.

UPON A PROPER CONSTRUCTION OF THE BILL OF LADING IT APPEARS THAT THE EXEMPTION WAS NOT INTENDED TO ATTACH UNTIL TRANSIT BEGAN, AND THE COTTON, WHILE AT COMPRESS, WAS NOT IN TRANSIT.

The language of those portions of the bills of lading which contain the exemption is as follows: "That the said Missouri Pacific Railway Company and its connections which receives said property shall not be liable for rust of iron and of iron articles, or for loss or damage by wet, dirt, fire, or loss of weight, or for condition of baling on hay, hemp, or cotton, nor for loss or damage of any kind on any article whose bulk

requires it to be carried on open cars, nor for damage to perishable property of any kind occasioned by delays from any cause, or by changes of weather, nor for loss or damage on any article or property whatever by fire or other casualty *while in transit, or while in deposit of places of transshipment, or at depots or landings at all points of delivery*, nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals."

An inspection of this language shows clearly that the words in italics are words which limit the scope of the general language which precedes them. It is a familiar rule of construction that where general expressions are followed by specific expressions, the latter will have the effect of limiting the meaning of the former—for if this effect were not given to the specific expressions they would be surplusage. Thus, in the present case the exemption in respect of "loss or damage by * * * fire * * * on * * * cotton" must be read in connection with the words "Loss or damage on any article or property whatever by fire or other casualty *while in transit*, or while in deposit in places of transshipment, or at depots or landings at all points of delivery." The subsequent clause would be entirely meaningless unless its effect is to limit the clause which precedes it.

This principle was applied by Cooley, J., to the exemption clause in a bill of lading in a far more doubtful case than this in Sisson *vs.* R. R., 14 Mich., 489.

The conclusion contended for is reached by the application of ordinary rules of interpretation. Even, however, if this were a doubtful case, that construction would be adopted which is most unfavorable to the carrier. Or, in other words, the exempting clause being in derogation of a common-law liability will be construed strictly.

In Hooper *vs.* Wells (27 Cal., 11), Sawyer, J., referring to the terms of a bill of lading, used the following language: "The language must be taken most strongly against the defendants. * * * The instrument was executed by them alone. It was drawn up with care in language selected by themselves, the blank form being printed in advance ready for

presentation to the persons offering property for transportation by their express. The restrictions were for their benefit."

Mr. Justice Bradley, in Railroad Co. *vs.* Lockwood (17 Wallace, 379), uses language which is here in point—language which Mr. Justice Gray quoted with approval in Liverpool Steam Co. *vs.* Phœnix Ins. Co. (129 U. S. 441): "The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out and seek redress in the courts. He prefers rather to accept any bill of lading or to sign any paper that the carrier presents; and in most cases he has no alternative but to do this or to abandon his business."

In speaking of a bill of lading, precisely like the one in question, the Supreme Court of Tennessee said:—

"These limitations upon the common-law liability of a common carrier are not favored. They are to be strictly construed, and limited to the general risk of the carrier after actual custody of the cotton, unless the terms thereof expressly extend to a special risk." (Deming & Co. *vs.* Merchants' Cotton-Press, 90 Tenn., 310, 1891.)

Authorities to the same effect might be multiplied indefinitely.

Such being the case, it remains to construe the language "*while in transit*, or while in deposit in places of transshipment, or at depots or landings at all points of delivery." The principles already adverted to require that the same strictness of construction should be adhered to in the solution of this portion of the problem. In view of this consideration, it seems impossible to escape the conclusion that the draughtsman of the bill of lading intended that the exemption should attach at the moment when transit may fairly be said to begin—at the moment, that is, when the goods are loaded upon the cars, that it should continue while the goods are progressing towards the place of transshipment, that it should be effective during the process of transfer from cars to vessel, and during such temporary storage or deposit as might be necessary in effecting the transfer. The word "transit" is not only patient of this construction, but seems to admit of no other. The

primary signification of the word is analogous to the meaning expressed by such a phrase as "while being transported" or "while being conveyed." When this latter phrase came before the Supreme Court of Michigan for interpretation in the Railroad Co. *vs.* Adams (15 Mich., 458), the construction contended for was unhesitatingly adopted. The language of the contract in that case was that "the company would not be responsible for articles *conveyed* upon its road unless," &c. It was held that this limitation applied only to the goods in transportation, and that it was not a limitation of the carrier's liability for injuries to the goods while in its possession waiting for transportation.

The effect of the language "in transit," &c., is well illustrated by an examination of a case in which those words were omitted from the stipulation in the bill of lading. In Scott *vs.* Balt., &c., R. R. Co. (19 Fed. Rep., 56), the exemption was as follows: "Dangers of the seas, fire, leakage, accidents from machinery and boilers excepted, and with liberty to tow and assist vessels in all situations," &c. It was held, of course, that this was an exemption from liability while the goods were on the wharf awaiting transportation. "It is contended," said the court on behalf of the plaintiffs, "that under the strict rules of construction applicable to stipulations by which the carrier seeks to limit his common-law liability, the word fire in these bills of lading, and more particularly in the one first mentioned, being classed with dangers of the seas and other risks of navigation, it is to be taken as only applicable to fire after the goods are laden on board. * * * I am unable to assent to this proposition. The liability of the carrier begins from the moment of receiving the goods (Hutchinson, section 89), and although preparatory to the transportation they are detained by him on his wharf or in his store-house, his responsibility then is in no respect different from his responsibility after the actual transportation has commenced. It is difficult, therefore, to see why, if he stipulates for exemption for losses from fire, he should not be understood to mean for goods while in his possession preparatory to their being laden as well as afterwards." No

stronger case could be cited in favor of the contention of the defendant; but it is obvious that it differs *toto in coelo* from the case in hand. Where, as in the case cited, no limitation is expressed as to the time which the exception will cover, it is of course reasonable to assume that the parties intended the exemption to be coextensive with the liability; but in the present case, just as in Railroad Co. *vs.* Adams (15 Mich., 458, *supra*), the parties have not left their intention to be gathered by inference. They have expressly declared that the scope of the exemption shall be narrower than the scope of the liability; that whereas the liability begins before transit the exemption does not attach until the transit begins.

It seems clear that the words, "or at depots or landings at all points of delivery," refer to the points of delivery at the termination of the carriage, and not to points of receipt at which the carriage begins. But even if by any chance the court were to ignore the evident sequence of thought which has controlled the wording of this exemption, and were to include within it depots at points of receipt, the defendant would in reality be in a no better position. It appears from the record that the cotton was destroyed at compress, and the exemption, even when thus broadly construed, applies only to loss in "depots."

This is, on principle, so clear that perhaps the citation of authority is superfluous. But since (as suggested above) an exemption clause, identical in all respects with the one in question, has actually received careful judicial interpretation, it may not be amiss to quote the language of the court upon the point: "Where * * * a carrier has effected an arrangement with a compress company to act as the carrier's agent, and receives cotton in the agent's press, and accepts delivery there by the shipper instead of at the carrier's own depot, and upon such delivery issues the ordinary carrier bill of lading, stipulating for exemption from loss by fire, it will not be construed to relate to fire in the cotton press. Such a clause will not cover a special risk like this." And again: "General clauses of exemption from loss by fire will be construed to relate alone to loss in depots, stations, on the cars, or in places

of transshipment of the carrier after actual custody of the cotton, and held inoperative to excuse from liability for this loss." (Deming & Co. *vs.* Merchants' Cotton Press, 90 Tenn., 320, 1891.) This case is on all fours with the case in hand. On page 322 the exemption in the bill of lading of the N. N. and M. V. Co. is set out and is the same in form as that of the Missouri Pacific.

III.

ASSUMING THAT THE EXEMPTION HAD ATTACHED AT THE TIME OF THE DESTRUCTION OF THE COTTON, AND ASSUMING THAT THE EXEMPTION WAS VALID IN SPITE OF THE LAW OF TEXAS, IT DOES NOT APPEAR THAT THE FIRE WAS NOT DUE TO THE CARRIER'S NEGLIGENCE, AND THE EXEMPTION APPLIES ONLY TO NON-NEGLIGENT FIRES.

It appears upon the record that the cotton in question was destroyed by fire. It also appears that the carrier's liability was so limited as not to include loss by such fire as was not caused by its negligence. The effect of this limitation was not to turn the common carrier into an ordinary bailee for hire, but to leave him a common carrier still, only with the range of his liability diminished. In Railroad *vs.* Lockwood, 17 Wallace, 376, Mr. Justice Bradley thus answered the argument of counsel, who sought to establish a different proposition: "We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries and at different times without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts also losses by means of *any* superior force and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities

are changed. The theory occasionally announced that a special contract as to the terms and responsibilities of carriage changes the nature of the employment is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer whereby the latter assumes the risk of inevitable accidents in the carriage of his goods."

The defendant, then, is a common carrier, and is *prima facie* liable at all events (of course, excepting the intervention of the act of God and the public enemies), and this *prima facies* he can overcome only by bringing himself within the exception of the bill of lading. But it has been seen that the exception contemplates only fires which are not the result of negligence, and it seems difficult to perceive how a carrier can claim the benefit of the stipulation in the bill until he has proved affirmatively that the fire was such a fire as the language of the instrument contemplates.

We are not unmindful of the well-known decisions of this court in N. J. Steam Navigation Co. *vs.* Bank, 6 Howard, 344 (1848), in Clark *vs.* Barnwell, 12 Howard, 272 (1851), in Transportation Co. *vs.* Downer, 11 Wallace, 129 (1870), and in some of the other cases referred to upon this point in the brief of plaintiffs in error. In these cases it has been repeatedly held by this court that where a carrier by water undertakes to carry safely, except as to perils and dangers of the sea, &c., he *prima facie* discharges himself by proving a loss by perils or dangers of the sea, and that the burden then rests upon the plaintiff to prove that the loss might have been averted by due diligence. It is contended, however, that while there is no distinction between the measure of liability and the standard of duty in the case of a carrier by sea and a carrier by land, yet there is a very important and radical distinction between the exception of a class of perils to which carriage by

sea is in the ordinary course of nature inevitably subject and the exception of loss by fire—a hazard to which carriage by land is not subject by any necessary natural condition, but which as a rule results only from the carrier's negligence.

The distinction contended for is between the exception of a class of perils which beset every ship—which, like "the perils of the sea," encompass the vessel at every moment of the voyage, and which may as no uncommon thing engulf her, even if the greatest care is used—and such a particular and specific peril as fire on land, the occurrence of which without fault is a most uncommon thing, and which usually occurs only as the result of some negligence. In the former case to state that a vessel is lost through the perils of the sea is *prima facie* to excuse the master. If it is sought to charge him with negligence, the negligence must be proved. In the latter case, to state that goods in the possession of a carrier have been destroyed by fire puts him in the common judgment of mankind *prima facie* upon the defensive. In the one case it is to his credit if by due care he prevents loss. It is *prima facie* no discredit to him if he incurs it. In the other case it is no credit to him that he avoids the loss—but *prima facie* it is a discredit to him if it occurs.

If this distinction is adopted by the court it will reconcile the above-cited decisions upon exceptions of perils of the sea and the many carefully considered cases relating to carriage by land in which it is held that the carrier, in order to bring himself within the exception, must show that it was through no fault of his that the goods were subjected to the fatal fire risk. Out of a large number of decisions which sustain this view the following have been selected as specimens:—

In Steele *vs.* Townsend (37 Ala., 247), a bill of lading given by defendant for goods shipped by plaintiff contained this clause: "Not accountable for rust or breakage." Upon proof of breakage of the goods, it was held that the burden was on the defendant to show that he had exercised due care.

Said Walker, J.: "We think * * * it true that an injury by 'breakage' to the articles shipped is not brought within the

terms of the exception, unless it is also shown that the breakage was not the result of the negligence of the carrier. In other words, the exception includes only such breakage as care and diligence could not prevent; and the injury is not within the exception until it is shown that it occurred notwithstanding the exercise of such care and diligence. It is not strictly accurate to say that the *onus* is on the carrier to show, not only that the cause of loss was within the exception, but also that he exercised due care. The correct view is that the loss is not brought within the exception, unless it appears to have occurred without negligence on the part of the carrier; and as it is for the carrier to bring himself within the exception, he must make at least *prima facie* showing that the injury was not caused by his neglect. * * *

"It is a mistake to suppose that by the insertion of such an exception as is found in this bill of lading the character of the employment is changed. The party receiving the goods still remains, notwithstanding this feature of the contract, a common carrier; his liability only to the extent of the exception is diminished. In all things else the very same principle applies. Care and diligence are still elements of the contract, and strict proof is properly required before any exemption may be claimed." * * *

So also from Ryan *vs.* Ry. Co., 65 Tex., 13 (1885), it appears that the law of the place where this contract of carriage was made is well settled upon this important question of evidence.

In this case the rule is asserted in all its broadness that, under an ordinary bill of lading, with no special exceptions, if the goods are lost by the act of God the burden is upon the carrier to prove that his negligence did not contribute to the loss; and that, where special exceptions are present, the carrier must likewise bring himself within the exception by rebutting the presumption of negligence. The former portion of this rule, while it is undoubtedly the common-law doctrine (see Story on Bailm., section 529), must be treated as superseded in this court by the decision in Railroad Co. *vs.* Reeves, 10 Wall., 179 (1869), in which case it is held

that where the railroad company proves a loss from a cause *excepted by the common law* (act of God or *vis major*), the burden is on the plaintiff to prove negligence. The latter part of the rule has, however, never been repudiated in this court, and it is earnestly contended that it should be applied to this case.

Of the cases cited by the plaintiff in error the following directly support the contention that when a carrier relies upon a contract of exemption he must bring himself within the exemption, and he does not do this by simply showing that the goods were lost or destroyed or injured by the excepted peril or accident, but he must go further and show that he was free from any negligence contributing to the loss or injury :—

Brown *vs.* Express Co., 15 W. Va., 812;
Berry *vs.* Cooper, 23 Ga., 543;
R. R. *vs.* Moss, 45 Am. Rep., 428;
Express Co. *vs.* Graham, 26 Ohio, 595.

IV.

THE CONTRACT WITH THE DEFENDANT AS COMMON CARRIER WAS A CONTRACT MADE AND TO BE PERFORMED IN THE STATE OF TEXAS AND IS GOVERNED BY THE LAW OF THAT STATE.

Upon scrutinizing the bills of lading it will at once be perceived that while they are foreign bills of lading in the sense that they contemplate a transportation of goods from Greenville through the port of Galveston to Liverpool, they nevertheless contain two independent contracts between the shipper and the defendant, in each one of which the shipper deals with the defendant in a different capacity. This is not a matter of argument or inference, but results necessarily from the language of the instruments themselves. It is specifically provided by the bills of lading, not only that the liability of the Missouri Pacific Railroad Company is limited to its own lines of railway and is to cease upon delivery to the next succeeding carrier—not only that the carrier upon

whose line loss occurs shall be exclusively liable for that loss, but also that "The liability of the Missouri Pacific Railroad Company as common carrier thereunder terminates on the delivery of the goods or property to the steamship or steamship's company, or their agents at Galveston." Language could not be more explicit. After delivery to the transportation company at Galveston the carrier's liability is at an end. The contract of carriage contained in the bill of lading is completely discharged. In so far as the Missouri Pacific Railroad Company occupied any relation whatever to the plaintiffs other than that of carrier between Greenville and Galveston, it stood in the relation of a mere forwarder of goods and a guarantor of freight rates, without liability of any kind beyond the limits of its own *infra*-State line of track. The contract which the defendant made with the plaintiff was a contract which could have been abundantly well performed by a carrier who was a carrier only within the State; and, to make assurance doubly sure, the carrier expressly stipulated that such was the character in which he was contracting.

The limited character of the defendant's undertaking as a carrier is further evidenced by the circumstance that the bills of lading were signed by one Downer, who signed as the agent, "severally, but not jointly," of the several carriers over whose lines the goods were to pass. It thus appears to be extremely doubtful whether any contractual relation whatever existed between the plaintiff and defendant with respect to any part of the transaction subsequent to the arrival of the goods at Galveston. But—as has been before observed—if such a relation existed, it was merely in virtue of the circumstance that the corporation defendant, having made one contract as a carrier, had seen fit to enter into another as a forwarder.

When the Supreme Court of Texas, in Missouri Pacific R. R. Co. *vs.* Sherwood (19 S. Western Reporter, 455), approached the decision of the question in hand, it made use of the following language:—

"Is the contract of shipment set out in the petition of ap-

pellees a contract of domestic or a contract of foreign or interstate shipment? By a contract of domestic shipment is understood such a contract as contemplates the shipment of goods from one point in a State to another point therein. By a contract of foreign or interstate shipment is understood such a contract as contemplates the transportation thereunder of goods from a point within a State to a foreign country, or to a point within another State. Transportation is only domestic when confined to the boundaries of the State in which the contract of shipment is entered into. Wabash, &c., Ry. Co. *vs.* Illinois, 118 U. S., 557; 7 Sup. Ct. Rep., 4; Louisville & N. R. Co. *vs.* Railroad Commission of Tennessee, 19 Fed. Rep., 679. Applying these definitions to the contract set out in plaintiffs' petition, the conclusion is inevitable that the shipment there described is a foreign shipment. The petition alleges an undertaking on the part of the carrier, defendant, to carry the cotton upon its lines, and to deliver it to its connecting lines, to be carried to the city of New Orleans, La., there to be delivered to the West India Pacific Steamship Company, to be transported to Liverpool, and there delivered to Martin, Wise & Fitzhugh, or their assigns."

With all deference to the learned Texas court it may be said that the foregoing examination of the contract contained in the bill of lading goes no deeper than the surface, and does not touch the real question involved in the case. That question is this: *Did the defendant, by issuing in Texas the bills of lading which are spread upon the record, become a party to a contract of carriage which was to be performed wholly within that State?* Obviously we are brought no nearer to the decision of this question by the statement that *the shipment described in the bills of lading is a foreign shipment.* The word "shipment" indicates that the transaction is looked upon from the shipper's point of view. To what point does he desire his goods to be carried? If, upon glancing at the bill, it is found that the ultimate destination of the goods is within the State, it is of course said that the shipment is a domestic shipment; if without the State, that it is an interstate or foreign shipment. Here the fact that the ultimate destination of the cotton

was Liverpool brings the shipment within the latter class. But the question remains: *What part does this defendant carrier take in the transaction?* When do its liabilities begin, and when do they end? It has been seen that the liability attached at compress, and the parties have agreed that it shall terminate at Galveston, and that the contract shall be deemed to have been executed by the defendant upon delivery of the goods at Galveston. The contract expired by its own limitation when the Texas line was reached.

This is so abundantly clear that the position of the Texas court in the Sherwood Case would be entirely inexplicable if it were not for the fact that in that case by an error in the pleadings the contract of carriage was stated to be from *Greenville, Texas, to New Orleans, Louisiana*, the goods to be forwarded by sea from the latter port. This error doubtless arose from the circumstance that some of the cotton lost in this fire was shipped under bills reading *via* New Orleans; and while the mistake in the Sherwood Case might have been discovered if the court had compared the bills of lading on which suit was brought with the averments of the petition, the language above quoted shows that the learned judge based his opinion upon a hypothetical state of facts—different from the facts actually before him, and very different from the facts of the present case.

The contract of carriage with the defendant, then, being made in Texas, and wholly to be performed in Texas, is presumably governed by the law of Texas.

Liverpool Steam Co. *vs.* Phenix Ins. Co., 129 U. S., 397 (1888).

In this celebrated case, involving bills of lading much like those in suit, Mr. Justice Gray, by a review of the principal cases demonstrated that according to the great preponderance, if not the uniform concurrence of authority, the general rule is that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view. The circumstance that it will presently be

contended that by the law of Texas the exemption in this contract of carriage is invalid in nowise interferes with the operation of this rule, as is evident from the decision in the same case. Moreover, it will be contended that the contract of carriage to be performed within the State is necessarily subject to the Texas statute in question, which is a statute of which the applicability does not depend upon intention, since it is framed to defeat intention. This naturally leads to a discussion of proposition V.

V.

THE EXEMPTION CLAUSE OF THE BILLS OF LADING IS MADE VOID BY ARTICLE 2781 OF THE REVISED STATUTES of TEXAS.

The article in question is as follows :—

" Railroad companies and other common carriers of goods wares and merchandise for hire within this State on land or in boats or vessels on the waters entirely within the boundary of this State shall not limit or restrict their liability as it exists at common law by any general or special notice or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation or in any other manner whatever and no special agreement made in contraversion of the foregoing provision of this article shall be valid."

The draftsman of the statute had in contemplation two kinds of carriage, carriage by land and carriage by water. Desiring to avoid all appearance of attempting to give the statute an extraterritorial effect he limits water carriage by defining the geographical limits of the waters, carriage on which was to be regulated, while he limits land carriage, not by reference to the geographical limits of the railroad track, but by reference to the *contract of carriage* as being an agreement to carry for hire within the State. This view of the statute is not in conflict with the construction put upon it by the Texas court, for the learned judge in the Sherwood case was construing it with reference to what he had previously determined to be a contract to be performed by the carrier partly outside

the State; and he justly observed that to so construe the statute as to apply to a carrier on land under those circumstances would result in destroying the contemplated equality of the provision as between carriers on land and by water. It having been shown, however, that the contract of carriage was in reality a contract to be performed wholly within the State, it becomes evident that the assumption upon which the learned judge proceeded was unfounded, and the construction based upon that assumption is not binding in this case upon this court.

In conclusion, it is to be observed that (as before suggested) this statute is binding upon the carrier under the facts of this case even if he did not intend to be bound by it. It is difficult to perceive how a railroad, by a contract made even outside of the State of Texas, could repeal a settled rule of public policy of that State. It is not like a statute of limitations which the parties may waive by agreement; but a rule of public policy which the carrier cannot repeal by notice or by agreement with his shipper as to the terms upon which he will accept goods for carriage within the State of Texas.

This view invites consideration of the final or sixth proposition—the effect upon the statute (if any) of the commerce clause of the Constitution.

VI.

Article 2781 of the Revised Statutes of Texas is not a regulation of interstate commerce.

It is contended (1) that the Texas statute would not be held to be a regulation of interstate commerce even if it were construed to apply to a contract of carriage made outside of the State and to be performed in it, and *vice versa;* and (2) that in any event it is not a regulation of commerce as applied to a contract of carriage wholly within the limits of the State.

1. This statute is one of those local regulations made for the protection and preservation of the life and property of citizens of the State which is not open to any valid objection

merely on the ground that it may affect persons engaged in interstate commerce.

This branch of the case is set at rest by the decision in Sherlock *vs.* Alling, 93 U. S., 39 (1876). In that case it appears that a steamboat belonging to defendant carrier was burned while engaged in interstate commerce between Ohio and Kentucky at a point in the Ohio River opposite Indiana. The plaintiff's intestate was killed in the accident, and suit was brought in Indiana under a statute of that State giving a right of action for death caused by negligence. It was held that since Indiana was the *locus in quo* of the *tort* the statute was effective, notwithstanding the fact that the defendant was engaged in interstate commerce when the *tort* was committed. In delivering the opinion of the court Mr. Justice Field said: "The position of the defendants, as we understand it, is that as by both the common and maritime law the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties for such tort, and that such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce.

"In support of this position numerous decisions of this court are cited by counsel to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. The decisions go to that extent and their soundness is not questioned. * * * In the present case no such operation can be assigned to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in death of parties injured. And in this application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or water. General legislation of this kind, prescribing the liabilities or duties of citizens of a State,

without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against such legislation prescribing the form in which contracts shall be authenticated. * * * In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating on all subjects relating to health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country."

The Steamboat Co. *vs.* Chase, 16 Wallace, is an authority to the same effect.

If a State can create a liability on the part of the carriers to the carried beyond that arising out of the ordinary relation of carriers, it would seem almost incontestable that a statute which does not create a liability, but prevents carriers from evading their ordinary liability at law within the State of Texas, cannot be treated as an interference with the right of Congress to regulate commerce.

The principle of this case applies as well to those cases in which contracts were made outside of the State of Texas as to the cases where bills of lading were issued in Texas. Within the territory of the State of Texas its laws as to the liability of all carriers ought to be controlling.

The right of the State to regulate the conduct and liabilities of its carriers seems to be embraced in what are generalized as police powers, of which instances may be cited:—

In R. R. *vs.* Fuller, 17 Wallace, 560. The fixing and posting of rates in the case of a railroad running through different States. Smith *vs.* Alabama, 124 U. S., 463. The right to require a license for locomotive engineers in interstate commerce. Nashville R. R. Co. *vs.* Alabama, 128 U. S, 96.

This last case cites Sherlock *vs.* Alling as an instance of the conceded right of the States to deal with such subjects.

In fine, it may be said that a statute which protects all shippers in Texas from terms which its railroads might otherwise impose cannot be treated as a burden or regulation of commerce.

2. Even if the considerations above adduced are not conclusive, it follows from the fact that this was a contract for domestic carriage that a regulation of the contract of the defendant could not be a regulation of interstate commerce. In Wabash R. R. *vs.* Illinois, 118 U. S., 557 (1886), Mr. Justice Miller speaks as follows: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid." In the present case it has been shown that this is such a contract as that which the learned judge described, wholly disconnected from the separate and distinct undertaking of the subsequent carrier, and in nowise connected with the separate undertaking of the defendant to guarantee the freight rate. It has also been seen that the Texas court confined the effect of the statute to just such contracts as this, and it is therefore impossible to perceive how the local legislation is in any sense in conflict with the national Constitution.

For the several reasons, therefore, which this brief is an attempt to develop, it is submitted that the judgment of the learned court below should be affirmed.

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